DIVISION OF THE HUMANITIES AND SOCIAL SCIENCES
CALIFORNIA INSTITUTE OF TECHNOLOGY
PASADENA, CALIFORNIA 91125

JUSTIFYING MINORITY PREFERENCES IN BROADCASTING

Matthew L. Spitzer
California Institute of Technology
University of Southern California

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by Matthew L. Spitzer*

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ABSTRACT

For the past 16 years racial and ethnic minorities, and, to a lesser extent, women, have been targeted by several Federal Communications Commission policies designed to increase the number of broadcasting stations owned by members of those groups. The FCC, prodded by judicial decisions, claims that by increasing the diversity of ownership of the airwaves it will increase the diversity of programming content. Hence, these policies -- termed "minority preference policies" -- are justified as a method of controlling broadcasting content. Congress is intensely interested in protecting these policies, while litigants are attacking the policies' constitutionality in the courts.

This article appraises the justification for the minority preference policies -- the purported connection between a broadcast station owner's race or sex and the owner's programming decisions. Do white males really program differently than Black, Hispanic, Asian/Pacific Islander, Alaskan/American Indian, or female owners? If so, when, and in what ways is this likely to be true?

In this article I will outline the content of the minority preference policies, pausing only briefly to review their history. Then I will present a basic model of programming choice by profit-maximizing broadcasters, and modify it to incorporate the race and sex of the broadcast station owner. This theory will provide two possible reasons that minority or female owners might choose to program differently than white males. Minority or female owners might give up some profits to satisfy a taste for specialized programming. Alternatively, minority or female owners might have a cost advantage at broadcasting programming targeted to their own groups. Next, I will review the data on the connection between ownership characteristics and programming choice. This data most likely supports the two possible reasons for minority and female owners programming differently than white males, but the data cannot give any hint of how strong these differences might be, nor can it completely rule out the possibility that there is no difference in programming choices between different types of owners. Last, I will show how the theory and evidence may play a role in the justification of the minority preference policies in the post Richmond v. J.A. Croson world of constitutional adjudication.

INTRODUCTION

Federal Communications Commission policies attempt to increase the number of broadcasting stations owned by racial and ethnic minorities, and, to a lesser extent, women. The FCC, prodded by early decisions of the Circuit Court of Appeal for the District of Columbia,[1] claims that by increasing the diversity of ownership of the airwaves it will increase the diversity of programming content. Hence, these policies -- termed "minority preference policies" -- are justified as a method of controlling broadcasting content. Congress protects these policies, while litigants attack the policies' constitutionality in the courts. In March, 1989, the United States Court of Appeals for the District of Columbia Circuit issued two decisions, one striking down one of the minority preference policies[2], and the other decision upholding another minority preference policy.[3] The Supreme Court will review these decisions.[4]

In this article I will concentrate on the justification for the minority preference policies the purported connection between a broadcast station owner's race or sex and the owner's programming decisions. Do white males really program differently than Black, Hispanic, Asian/Pacific Islander, Alaskan/American Indian, or female owners? If so, when, and in what ways is this likely to be true?[5]

Before I begin answering these questions, however, I should highlight the nature of my enterprise. The FCC justifies the minority preference policies on the theory that minority owners and female owners will program a different mix of material than will white male owners. This immediately raises two questions. First, why not just require broadcasters, regardless of race or sex, to program the special material that the FCC hopes that minority and female owners will choose to put on the air? This would avoid the need for explicit racial classifications in the law. Second, why not justify the minority preference policies directly on the ground that minorities and women have been victims of past discrimination, and that these policies remedy past discrimination? This would avoid the need to show a relationship between owners' ethnic or sexual characteristics and programming choice. For the purposes of this article, I will assume that neither question can help us avoid the basic inquiry in this Article. First, directly requiring broadcasters to program special material runs afoul, I will presume, of either the first amendment's guarantee of freedom of speech and press[6], or of the Communication Act's prohibition of censorship.[7] Second, in the disputes that have reached the Supreme Court the minority preference policies cannot be justified as

remedial measures simply because neither the Commission nor Congress has ever claimed this to be so. As a result, neither the FCC nor Congress has developed a factual record that might support the remedial claim.[8] Because I presume that the FCC cannot directly require minority programming, and because the FCC cannot now claim that the minority preference policies are remedial, I must investigate the relationship between female or minority ownership and programming.[9]

My investigation of the relationship between female or minority ownership and programming will not ascertain whether or not there is enough evidence to satisfy a skeptical social scientist of the relationship. (I strongly suspect that there is not.) Instead, I will evaluate the theory and evidence of program choice against the background of legal standards for upholding explicit racial classifications.

In this article I will outline the content of the minority preference policies, pausing only briefly to review their history. Then I will present a basic model of programming choice by profit-maximizing broadcasters, and modify it to incorporate the race and sex of the broadcast station owner. This theory will provide two possible reasons that minority or female owners might choose to program differently than white males.[10] Minority or female owners might give up some profits to satisfy a taste for specialized programming. Alternatively, minority or female owners might have a cost advantage at broadcasting programming targeted to their own groups. Next, I will review the data on the connection between ownership characteristics and programming choice. This data most likely supports the two possible reasons for minority and female owners programming differently than white males, but the data cannot give any hint of how strong these differences might be, nor can it completely rule out the possibility that there is no difference in programming choices between different types of owners. Last, I will show how the theory and evidence may play a role in the justification of the minority preference policies in the post Richmond v. J.A. Croson[11] world of constitutional adjudication.

I. THE MINORITY PREFERENCE POLICIES

Every broadcaster in the United States of America must have a license from the FCC.[12] A broadcast license lasts for seven years in radio and for five years in television, and must be renewed at the time of expiration for a broadcaster to continue broadcasting.[13] There are two basic methods of obtaining a broadcast license, direct grant from the FCC or purchase from an existing licensee. The FCC grants licenses two different ways. First, it awards radio and television licenses to applicants after holding comparative hearings. According to the basic theory, when several applicants ask the FCC for the same license,[14] the FCC compares several relevant characteristics of the applicants, combines the comparisons within each of the

characteristics into an overall evaluation of which broadcaster would best serve the "public interest", and then awards the license to the best applicant.[15] Some of these areas of comparison, sometimes known as comparative criteria, include diversification of ownership of mass media, integration of ownership with management, and technical virtuosity.[16] Second, the FCC grants certain types of licenses, particularly low power television licenses, by lottery.

Sales of broadcasting licenses usually generate far less administrative process. Buyers and sellers are usually introduced through brokers[17], and the FCC is precluded by statute from considering anyone other than the proposed buyer when passing on the sale. As long as the new owner seems acceptable, the FCC must approve.[18] The FCC enforces four minority preference policies. Two of them -- the minority and female merit in comparative hearings and the lottery preference -- apply to FCC license grants. The other two -- the distress sale and the tax certificate -- apply to license sales.

A. MINORITY AND FEMALE MERIT IN COMPARATIVE HEARINGS

Any datum suggesting that one of several applicants for a broadcasting license should be preferred under a particular criterion used in the comparative hearing will be termed an "enhancement"[19] or a "merit."[20] Prompted by the TV9 case[21], the FCC awards a merit under the diversification of ownership criterion to any applicant, a substantial percentage of which is owned by one or more minorities. In TV9 the FCC had attempted to assert that the Federal Communications Act is "colorblind," and offered to take an applicant's race into account only to the extent that the applicant could show that his race would likely lead to better, more diverse programming in the particular case. The DC Circuit reversed, essentially requiring the FCC to award a merit to any minority applicant without the need for any demonstration that the award would improve programming service in the particular case.[22]

The FCC not only complied with the TV9 ruling, but just four years later extended it to women.[23] However, the FCC decided to extend "a merit of lesser significance"[24] because women, unlike racial minorities, had not been "excluded from the mainstream of society" due to prior discrimination.[25] Just as in TV9, the FCC required no proof of connection between female ownership and diversity in program content.

B. TAX CERTIFICATES

In 1978 the FCC adopted two policies designed to stimulate the sale of broadcasting stations to minorities because "[f]ull minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming."[26] The first such policy called for the FCC to issue special tax certificates when a station is sold to "parties

with a significant minority interest."[27] A tax certificate would allow the seller to defer any capital gain tax on the sale, thereby giving the seller a substantial incentive to seek out qualified minority buyers, and accept offers from minority buyers even where the minorities offer slightly less money than prospective white purchasers.

The FCC reports that it has issued 178 tax certificates since the inception of the program, and that the rate of use of the program has been growing quickly.[28] The Los Angeles Times reports that Geraldo Rivera and four partners are spending hundreds of millions of dollars to assemble a new broadcast network utilizing tax certificates.[29]

The same year that the FCC adopted the tax certificate policy (and the distress sale policy, discussed below) for minorities, it refused to extend either policy to women. In a moderately surprising change of position, the FCC stated "while receptive to factual showings in specific cases which indicate a need for preferential incentives to encourage female involvement/ownership, we have not concluded that the historical and contemporary disadvantagement suffered by women is of the same order, or has the same contemporary consequences, which would justify inclusion of a majority of the nation's population in a preferential category defined by the presence of 'minority groups.'"[30]

C. DISTRESS SALES

When the FCC announced the tax certificate policy it also announced the distress sale policy. Under that policy the FCC offered to approve the transfer of any license that had been designated for revocation hearing, or for renewal hearing on basic qualification issues, if the buyer was a minority who purchased the station before the start of the hearing, and paid no more than 75% of fair market value.[31] The purchaser could apparently take the license free of the taint that occasioned the hearing. Such a policy obviously gives licensees in trouble an incentive to seek out minority purchasers. The price ceiling of 75% of fair market value gives minority purchasers an incentive to seek out licenses in trouble. The FCC reports that the distress sale policy has been used less than 40 times since its inception, far fewer times than the tax certificate policy.[32] As I indicated in the paragraph above, the FCC has refused to extend the distress sale policy to female purchasers.

D. LOTTERY PREFERENCES

In 1981 Congress amended section 309(i) of the Federal Communications Act to allow the award of broadcast licenses by lottery.[33] The statute gave discretion to the FCC to use a lottery and directed FCC to " . . . establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection, groups or organizations,

or members of groups or organizations, which are underrepresented in the ownership of telecommunications facilities or properties will be granted significant prefernces." The Conference Report accompanying the bill provided "it is the firm intention of the conferees that ownership by minorities, such as Blacks and hispanics, as well as by women, and ownership by other underrepresented groups, such as labor unions and community organizations, is to be encouraged through the award of significant preferences in any such random selection proceeding. These are groups which are inadequately represented in terms of nationwide telecommunications ownership, and it is the intention of the conferees in establishing a random selection process that the objective of increasing the number of media outlets owned by such persons or groups be met."[34]

The FCC refused to implement any such scheme, claiming that it was too vague, and requested Congress to provide a new, more specific mandate. In 1982 Congress responded by passing new subsection 309(i)(3)(C)(ii) which provides "[t]he term 'minority group' includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders." In addition, Congress amended 309(i)(3)(A) to direct that ". . . significant preferences will be granted to applications or groups of applications, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group."[35]

The FCC granted lottery preferences to the listed groups, plus those owning no or very few other media interests,[36] and then, after a quite divisive rulemaking proceeding[37], decided not to give lottery preferences to women.[38]

E. COURT CHALLENGES AND SUBSEQUENT HISTORY

1. West Michigan Broadcasting Co. v. F.C.C.

In 1984 the D.C. Circuit affirmed the legality of the minority preference in comparative hearings in West Michigan Broadcasting Co. v.F.C.C..[39] Two applicants, West Michigan Broadcasting and Waters, clashed over the award of an FM radio station in Hart, Michigan, a community with no significant Black population. Waters, wholly owned by a Black woman, was granted the license, partly because of an enhancement for the owner's race. West Michigan appealed, claiming that the enhancement was illegal under the Federal Communications Act and under the Due Process clause of the Fifth Amendment to the Constitution. J. Skelly Wright, writing for a unanimous court, turned aside both challenges. The enhancement in a comparative hearing was lawful because the FCC is to be guided by the "public interest" standard

embedded within the Federal Communications Act of 1934, and part of the public interest includes ensuring a diverse set of program offerings to the public. The TV9 decision from 10 years before should be interpreted, said the court, to require the FCC to assume that Black owners will present distinctive programming[40], and that such programming is valuable not only to satisfy the preferences of Black audiences, but also to expose others to new points of view and ideas.[41] The Constitutional attack was turned away largely on the strength of two Supreme Court decisions, Fullilove v. Klutznick,[42] and University of California Regents v. Bakke,[43] that will be discussed at greater length later in this article.

2. Steele v. F.C.C. and the Aftermath

In 1985 The D.C. Circuit first held unlawful the female preference in comparative hearings in Steele v. F.C.C.[44], and then vacated the Steele opinion and remanded the case, along with others, to the FCC. The Steele opinion stated that minority and female preferences rested on two assumptions: 1) minority and female owners have different tastes and preferences than do white males; and 2) these tastes and preferences are manifested in the programming choices of minority and female owners.[45] The opinion regarded the first assumption as stereotyping, and the second as empirically unlikely, because programming decisions are more likely profit-driven rather than preference-driven.[46] Whereas the D.C. Circuit was willing to swallow these assumptions in the case of minority preferences, it was not willing to do so for female preferences.

In any event, after the D.C. Circuit granted rehearing en banc in Steele, the FCC changed its position and indicated that it no longer supported the minority and female preferences.[47] The D.C. Circuit then remanded Steele, along with two other cases, back to the FCC for reconsideration and for further investigation of the factual predicates for the minority and female preferences in comparative hearings. The FCC put out a notice that it was rethinking the entire area[48] and also mailed detailed questionnaires to licensees, requesting answers to questions on the relationship between ownership characteristics and programming content.

The FCC got approximately a 79% response rate to its questions, but before it could do anything with them, or with the entire inquiry into minority and female preferences, Congress passed House Joint Resolution 395, terminating the inquiry and directing the FCC to use the preferences.[49] As a result, the FCC terminated its inquiry, reinstated the licensing decisions in favor of the minority and female licensees in the remanded cases,[50] and delivered the returned questionnaires to the Congressional Research Service for analysis. The Congressional Research Service has since issued a report that claims to find some support for the connection

between ownership characteristics and programming choices. And two of the cases that were remanded to the FCC during the Steele proceedings found their way back to the D.C. Circuit, which issued decisions in March, 1989, finding the distress sale policy unconstitutional and the minority preferences in comparative hearings constitutional. Each decision has more than one opinion containing heated disgreements between the empanelled judges, and one of the main points of contention is the relationship between minority and female ownership and programming choices.[51] The Supreme Court has decided to review both cases.[52] Hence, a legal storm is brewing over minority preference policies, and the relationship between ownership characteristics and programming choices seems to be a major part of it.

II. A SOCIAL SCIENCE APPROACH TO DETECTING THE RELATIONSHIP BETWEEN OTHERS' CHARACTERISTICS AND PROGRAMMING CHOICES

This section will present the theory of program choices by profit maximizing owners in broadcasting markets, and then modify that theory to take into account the race or sex of a broadcast station owner. Then I will evaluate the few studies of the connection between owners' characteristics and programming choices against the theoretical background I have developed. I will put off for section III an investigation of the legal doctrines under which this investigation might (or might not) play a crucial role.

A. BASIC THEORY OF PROGRAM CHOICE BY RATIONAL PROFIT MAXIMIZERS

This section will investigate the basic theory of program choice by profit maximizing owners, paying special attention to how and under what cirumstances such owners will choose to present minority-interest programming, rather than mass appeal fare. The theoretical literature has two parallel (and for my purposes quite similar) lines of analysis of the question of broadcast programming. One set of articles, stemming from Steiner's paper "Program Patterns and Preferences, and the Workability of Competition In Radio Broadcasting,"[53] models radio broadcasting as a game between broadcasters who are interested in gaining large audiences.[54] We will spend a substantial amount of time learning this theory because it is crucial to subsequent discussion. A second set of articles, stemming from a paper by Spence and Owen,[55] uses modern monopolistic competition theory to analyze the problem. We will spend less time on these models because, for our purposes, they add little to the insights from the Steiner models.

1. Steiner Models

a. Steiner's Original Article

Steiner wrote his article in an effort to map the relationship between (monopolistic or competitive) market structures in broadcasting and the "nature and quality of particular - programs" produced by the industry.[56] Steiner took as given the "three cornered" nature of the broadcasting industry: broadcasters lure audiences with programs and sell the audiences to advertisers, who in turn show advertisements to the audiences. Audiences do not pay directly for the broadcast programs. Within this framework, Steiner asked his readers to make the following assumptions. First, once a program has been broadcast, there is no additional cost of adding another viewer. (In this sense, broadcasting is a public good). There is one time period in which a broadcaster must decide what to program. He can select one from a series of program "types", and will make his choice so as to maximize the number of viewers (or listeners) for his station. Each viewer wishes to watch one type of programming, and will watch if that type is shown. Otherwise, the viewer will not watch.

Table 1 here

The essence of Steiner's insight can be captured by looking at a numerical example in table 1. Assume that there are only four types of program -- L_1, L_2, L_3, L_4 -- and that there are 210 consumers who prefer L_1, 75 who prefer L_2, 50 who prefer L_3, and 31 favor L_4. Within the model's assumptions, consider the program mix that will be produced by 1, 2, 3, or 4 competitive broadcasters.

Table 2 here

As shown in table 2, if there is only one broadcaster, he will show L_1 and garner all 210 viewers of that type. A second, competitive broadcaster, will also show L_1, because he can get 105 (1/2 of 210) viewers, which is better than the 75 viewers he could get from showing L_2. A third competitor will show L_2, because a third channel of L_1 would get only 70 viewers, whereas L_2 gets 75. But a fourth competitor would choose to show L_1, because 70 viewers is more than it could get with any other choice.

Table 3 here

In contrast, as shown in table 3, a monopolist that controlled all channels would never choose to duplicate any programs. As long as the advertising revenues from the least popular type of show (L_4) were sufficient to cover costs of production and exhibition, the monopolist would utilize all available channels and show a diverse mix. The three types of minority-interest programming, L_2, L_3, and L_4, would gain much more exposure in a monopolistic, rather than a competitive market.

Steiner's article is crucial for two reasons. First, his method of formalizing models of broadcasting markets changed the way subsequent scholars have looked at the industry. Second, his rather startling conclusion that a monopolist can be expected to cater to minority tastes more than competitors both explained many viewers' sense of the overwhelming "sameness" of offerings on the network triopoly, and challenged our traditional reverence for competition.

b. Bebee's Article

Steiner's insights were independently rediscovered and slightly extended by Rothenberg in 1962,[57] and then extended further by Wiles in 1963,[58] but the biggest advance on these models was produced by Bebee in 1977.[59]

i. Assumptions

Although many of Bebee's basic assumptions mirror those of Steiner, the assumptions about viewer preferences and behavior differ substantially. In particular, Bebee varied the degree to which the distribution of preferences is skewed across program types, and also varied the extent to which viewers are willing to watch mass appeal programming if their favorite types are not available. Bebee's model assumed that there are five program types and five groups of viewers. Bebee made nine alternative assumptions about market demand, derived by crossing three alternatives about the number of viewers in each of the groups with three alternatives about program preferences within the groups:

Table 4 here

Table 4 fills in the details of Bebee's assumptions. His first set of assumptions about viewer preferences ("viewers watch only first choice") corresponds to Steiner's assumptions. His second assumption allows each viewer to have a second choice. For example, viewers in group number 5 prefer to view program type five, but if no type five program is on they will be willing to view type four. If neither program type five nor type four is available, viewers in group five will not watch. Viewers in group one are willing to watch only type one programs. With Bebee's third assumption -- that there is a common denominator -- all viewers will be willing to watch type one programs. For viewers in group one this is the only type of program they will be willing to watch. For members of all other groups, however, type one programming represents an acceptable second or third choice.

Bebee's three alternative assumptions about the sizes of the viewer groups, also listed in table 4, complete his assumptions about viewer demand.

Bebee provides eight alternative characterizations of program supply. First, he varies program costs, assuming that they are either high (requiring an audience of at least 1,200 viewers to break even) or low (requiring an audience of only 800 viewers to cover costs). Second, Bebee allows channel capacity to be limited (three channels) or unlimited. Third, he allows the broadcasting channels to be controlled either by a monopolist or by a set of competitors. By crossing (1) high and low costs with (2) limited and unlimited channel capacity and with (3) monopolistic and competitive control of broadcast channels, Bebee provides eight characterizations of program supply.

With nine alternatives for market demand, and eight alternative characterizations of program supply, Bebee has 72 different economies to analyze. For each of these economies, Bebee calculates the equilibrium program output with a computer program.[60] Then, by observing the changes in programming output as only one of the variables changes, Bebee observes the effect of that particular variable.

In Bebee's model a monopolist provides whatever will maximize his own profits, given the other parameters of the economy, and does so by wooing the largest total audience for the broadcasting system. Whatever a monopolist provides is, by definition, the programming output of the industry.

Calculating the programming output of a competitive industry is a bit more complex. A competitor, like a monopolist, wishes to maximize his own profits, but does so by maximizing the size of the audience on his own channels, given what other competitors offer. To predict the simultaneous output of several competitors, Bebee uses the following concept of equilibrium. Competitive broadcasters are in equilibrium[61] if no competitor has an incentive to alter his own program offering so long as no one else changes his programming, either. Bebee assumes that competitive broadcasters will reach an equilibrium, and once having done so will remain there. The programming output of the broadcasting industry can then be calculated.

ii. Results

We will not go over all of Bebee's results, for they are not all of central importance to this article's purposes. We will discuss several of them, however, to understand how the broadcasting industry produces minority-interest programming in Bebee's model.

Table 5 here

* here the solution is a cycle of program offerings (similar to the child's game of scissors, rock, and paper), rather than a stable, pure strategy equilibrium.

** this case was not included in Bebee's chart

Table 5 contains the results of five cases in Bebee's paper.[62] Case number 1 corresponds

to Steiner's original result. If viewers will watch nothing other than their first choices, and if viewer groups are highly skewed, a monopolist will produce some minority interest programming, while competitors will tend to duplicate whatever the largest group likes best. However, as we begin to diverge from the two assumptions about market demand inherent in the Steiner paper, Steiner's results begin to fail. Case three uses the same preference pattern as case one, but assumes that the viewer groups are almost equally sized. In this case the monopolist will program the maximally diverse offering, but so will competitors. (Note that as long as each of the three competitors believes that the others will continue to offer the equilibrium programming, none will change his own offering.) Case six shows that competition can be much more diverse than monopoly. If viewers are all willing to watch common denominator programming, and if viewer groups are of almost equal size, a monopolist will provide nothing but common denominator programming,[63] while competitors will offer a completely diverse lineup.

Together, these examples show that there is an interaction between the variable of monopolistic versus competitive control of broadcasting channels, and the distribution of viewer tastes. Monopolists produce more minority interest programming if viewers are unwilling to watch anything but their first choices, and if their first choices are highly skewed. But competitors produce much more minority interest programming if viewers are willing to watch common denominator programming, and their first choices are fairly evenly distributed.

Bebee calculates the programming output for all of the 72 alternative economies and finds several tendencies. First, the interaction between the existence of competitive or monopolistic control of the broadcasting industry and the distribution of viewer tastes and preferences described in the paragraph above persists as long as the number of channels is quite limited. Monopolists will produce common denominator programming if viewers will watch it, and competitors will duplicate the first preferences of large groups (rather than produce minority interest programming) if the distribution of viewer preferences is skewed. However, if the number of channels is quite large, competitors will produce at least as much minority interest programming as will a monopolist.

Second, consumers are never made worse off by the addition of additional channel capacity.[64] In particular, the amount of minority interest programming never contracts in response to an expansion of channel capacity, and sometimes it increases.

Third, Bebee notes than program costs, included in his model as a minimum audience size needed for a program to break even, can change the analysis drastically. If costs are high relative to the potential audience for a program, neither a monopolist nor competitors will

produce the program, leaving channels vacant rather than produce the minority interest programming. In such cases, the observed duplication of the first choices of large groups (by competitors) or common denominator programming (by a monopolist) should not be taken as evidence that viable, but less profitable minority interest programming is being ignored.

iii. Missing Links?

Are any of Bebee's results dependent on crucial, unrealistic assumptions? The most important, which will be explored within the context of monopolistic competition models, is the assumption that viewers do not pay directly for programming. The arrival of pay-per view will make such an assumption faulty. In addition, different audiences have different demographic appeal, and this is not directly addressed in the Steiner model. However, nothing much turns on this, as one can just "count" a viewer with more demographic appeal (read disposable income) as more than one viewer. The model then works fine. Third, Bebee's results assumed that ad prices would be the same in a monopolistic and a competitive environment. However, a monopolist would likely restrict available ad minutes so as to raise their price and his profits.[65] This might provide a direct benefit to some viewers. How would it affect minority interest programming? Depending on the elasticities of demand for minority interest programming and common denominator programming, a monopolist might find minority interest programming more profitable, less profitable, or unchanged when compared to common denominator programming under a competitve pricing system. In general, nothing can be said about this effect.

2. Monopolistic Competition

In 1977 Spence and Owen introduced a monopolistic competition model of broadcasting competition so as to evaluate the welfare consequences of monopoly versus competition within a context of either advertiser support or direct viewer payments for programs.[66] Spence and Owen use a traditional economic measure of welfare -- the total of producer and consumer surplus[67] -- to evaluate the output of the broadcasting market. Although a welfare analysis of the broadcasting market can be quite interesting in its own right, for our purposes we are more interested in the positive description of the industry's output. For this reason we will first learn the basics of a monpolistic competition model, and then summarize its predictions, given alternative assumptions, about the final program mix in the industry.

Spence and Owen's monopolistic competition model, in its most general form, posits that no firm's programming output can be duplicated exactly by a competitor. However, competitors can broadcast programming that consumers regard as imperfect substitutes. This

shapes demand for each firm's output. The better are the substitutes for a station's programming, the less market power it has. Each firm must decide what programming to produce, given the decisions of the other stations.[68] The decisions are shaped by whether or not viewers pay directly for programming, as well as whether the industry is controlled by a single monopolist, or has a place for many monopolistic competitors.

After a great deal of mathematical grinding[69], Spence and Owen discover some biases in the broadcasting system. First, they consider pay-TV with competition between channels. If minority taste programs have steep inverse demand functions -- that is they are very highly desired by a small number of people, and desired by a greater number only at very low prices (if at all) -- then there will be a "bias" against producing minority interest programming. However, we must be careful to note that Spence and Owen have a very special meaning for the word bias in this context. They mean that majority interest shows that produce little consumer surplus may be more profitable than minority interest shows that produce a great deal of consumer surplus. Thus, from the standpoint of welfare economics, a monopolistically competitive industry may produce too few minority interest programs. Spence and Owen only describe a tendency in the industry. They do not compute exact industry output, nor do they suggest that there will be no minority interest programming. Next, they ask if advertiser-supported television would suffer from the same sort of bias, and conclude that the bias against minority interest programming would be even worse than it was under pay-TV.

Second, Spence and Owen find that there will be a bias against costly programs, again measured by the consumer and producer surplus norm.[70] And, last, they find that a monopolist will, not surprisingly, restrict the number of shows so as to raise prices, and reduce overall welfare.[71]

The Spence and Owen analysis has been extended and modified in a only a few papers, but most of the results are aimed at a welfare analysis of various market structures, rather than directed at the question of minority programming.[72] To the extent that the newer literature does address questions of minority interest programming, it tends to reach the same conclusions that the Steiner and Spence-Owen models reached. [For example, Waterman analyzes the programming choices of a monopolist cable television operator who has control over production budgets, and who faces either advertiser or pay support, within a context of limited or unlimited channel capacity.[73] Waterman finds that as the number of channels increases, the audience fragments and minority-interest programming finds its way onto the cable system.] Borenstein finds that a system with a limited number of broadcast licenses will have a bias against minority-interest programming.[74]

3. Public Choice Models

i. Noam's Model

Eli Noam has published a model that utilizes techniques first developed in the literature on public choice, in particular voting behavior and candidate's platform choices.[75] Noam assumes that every program can be located on a one dimensional scale running from "low culture" to "high culture." (Although Noam does not says so, I would guess that public broadcasting's "Masterpiece Theater" is high culture, while the Disney Channel's "Mouseterpiece Theater" is low culture.) A given type of programming has a "pitch" -- Noam's term for the program's point on the culture dimension. Each viewer has a most preferred pitch. If his favorite type of program is shown he will watch. If his most preferred type of program is not shown, the viewer might or might not watch. The further the distance from his most preferred pitch to the closest substitute shown, the less likely the viewer is to watch.

Noam assumes that viewer tastes are distributed normally[76] and then analyzes the programming choices of broadcasters under conditions of monopoly or competition, single or numerous channels, and private or public control.

Noam first shows that if there is only one broadcast channel, and a private, profit-maximizing monopolist controls it, and if all portions of the audience are equally valued by the advertisers, the monopolist will program so as to maximize audience -- achieved by choosing the pitch equal to the midpoint of the normal distribution. If viewers who prefer high culture programs have more income, and are therefore more desired by advertisers, the monopolist will shade his program choice toward high culture. Noam then shows that if the government controls the broadcasting station, it will program so as to achieve its own goals. If the nature of programming were to be an issue in an election, rival parties would promise programming so as to woo voters. Assuming that the distribution of voters and viewers is identical, a two-party system would converge upon centrist programming.[77] Noam also investigates the use of a government broadcasting monopoly for spoils purposes, and for propaganda, but Noam's most important analysis for our purposes involves multichannel television.

Noam's conclusions are generally consistent with those of Bebee and the Spence-Owen models. Most crucial is that numerous competitors will have an incentive to serve minority tastes.

> As the number of stations increases, their spread across the distribution widens, i.e., more "outlying" program tastes are reached. At the same time, the spacing between the chosen program pitches decreases, and viewers find closer substitutes for their favored program pitches.[78]

However, Noam also concludes that a duopoly will not converge to common programming, but

rather differentiate their programs. This is a direct result of Noam's assumption about viewer preferences -- that as the distance from a favorite program pitch to the closest offered program grows, the probability of viewing declines -- and shape of the distribution of viewer tastes. This includes some of the same logic as Bebee's first preference pattern, where viewers are willing to watch only first choices, and a nearly rectangular distribution. With these preferences competitors also differentiated themselves. Noam also finds that it will take many competing stations before those whose tastes lie at the extremes will be served. (The success of the "Gong Show" may prove that those at the low culture end of the spectrum have a chance at being served by commercial broadcasters.) This provides, he says, a rationale for having a government-controlled channel produce some minority-interest programming. If the government does so, however, commercial broadcasters will have much less incentive to produce such minority-interest broadcasting material on their own.[79]

ii. Cox's Models of Candidate Platform Competition

Gary Cox has analyzed the strategies of politicians who are attempting to maximize their share of the vote by choosing positions on a one dimensional (liberal-conservative) dimension.[80] He has shown that if voters have ideal positions on the issue dimension, and that they will vote for candidates who are closer, rather than those who are farther away, then as long as there are at least 3 candidates, not all candidates will take the same position on the issues.[81] In addition, if there are m candidates, at least one of the candidates will choose a position such that at least (m-1/m) of the voters are to the left, and another will choose a position such that at least (m-1/m) of the voters are to the right.[82] In other words, not all candidates will be centrist, and the more candidates there are in the race, the more extreme some of them will be.[83]

Cox's results also have meaning for the broadcasting market. If broadcast programming can be characterized as having a position on a one dimensional space (as in Noam's work), and if viewers will watch the programming closest to their ideal program, then audience-maximizing broadcasters' behavior is described by Cox's model. As long as there are 3 broadcasters in a market, not all will broadcast the same thing. And if there are m broadcasters, at least one of them will program such that at least (m-1/m) of the viewers are to the left, and another will program such that at least (m-1/m) of the viewers are to the right. The more broadcasters there are, the more "extreme" some of the will be. Put differently, if adding more broadcasters into a market will increase service to the "minority" audiences out at the endpoints of the dimension.

4. Pulling the Theories Together

In general, these theoretical works agree on the circumstances under which profit-maximizing broadcasters will provide minority-interest programming. If viewers are unwilling to watch anything but first choices, and if their first choices are highly skewed, and if the number of channels is quite limited, then a monopolist will produce more minority-interest programming than will competitors. On the other hand, if viewers are willing to watch mass-appeal (a.k.a. common denominator) programming and if first choices are close to evenly distributed, competitors will provide much more minority-interest programming. This result holds regardless of whether the number of channels are limited or not. If the number of channels is extremely large, competitors will tend to provide at least as much minority-interest programming as a monopolist. Intermediate cases produce intermediate results.

Later in this paper I will ask how, if at all, including the race, ethnic origin or sex of a broadcast station owner might be expected to alter the basic theory of producing minority-interest programming. But before I do that, I will stop to check some empirical work that seeks to test the basic theory of program selection. After all, if the basic theory were to fail to predict basic observations, I would have much less warrant for relying upon that theory, below.

B. DATA TESTING THE BASIC THEORY

In a very recent working paper Rogers and Woodbury[84] provide a statistical test aimed at evaluating whether an increase in the number of radio stations in a market produced an increase in the number of formats. Rogers and Woodbury used the number of formats as the dependent variable[85], and used market population, median household income, and a some demographic variables as the independent variables. To get some measure of the dispersion of tastes in the population -- a variable Bebee's analysis suggests is crucial -- Rogers and Woodbury use percentage of the market population over age 34, percentage that is Black, and percentage that is Hispanic. The results tend to confirm the basic theory of programming choice. The coefficients of the number of stations in the market, and the coefficients of the measures of Black and Hispanic population are all positive and significant. Only percentage of the population over 34, which seems less connected to taste dispersion than the Black and Hispanic variables, and the income measure, which is poorly tied into the basic theory in the first place, are insignificant.

Waterman and Grant[86] assembled a data base from a sample of 16 full days of programming on 40 nationally-distributed cable and broadcast networks between January 1 and June 30, 1986. Waterman and Grant included 26 basic cable networks[87], 11 premium

channels[88], and three broadcast networks.[89] They coded all programming by subject matter[90], by origin[91], and by format[92], and then obtained Neilsen ratings for 19 networks on which ratings were available. Waterman and Grant found that cable networks offered a huge increase in number and diversity of offerings over that available on the three broadcast networks. The increase includes offerings in such categories as "Classical/Ethnic music or dance" and "Foreign Language" -- categories in which ABC, NBC, and CBS offer nothing.[93] The authors conclude that the expansion of channel capacity in cable television has produced a substantial amount of new diversity in programming. This supports the basic model of minority-interest programming that we developed in section ____, above.

D. PUTTING THE RACE AND SEX OF THE OWNER OF BRAODCAST STATIONS INTO THE MODEL OF MINORITY-INTEREST PROGRAMMING

This section will ask how the race and sex of the owner of a broadcasting station might be included in the programming models discussed above. I will review the three most obvious possibilities. First, race and sex might be irrelevant. Second, minority or female owners of stations might engage in some consumption through choice of programming that does not maximize profits. Third, minority or female owners might have cost advantages (vis a vis white males) at broadcasting minority interest programming.

1. Race and Sex Might Be Irrelevant to Programming Decisions of Owners

It is possible that all owners, regardless of race or sex, are motivated by the desire for profit. Further, talent and cost-effectiveness at broadcasting different formats might be randomly distributed across races and sexes. If this is so, the models used above would not be altered at all, and any empirical investigation would find that, after controlling for all other factors (such as number of stations in a market), formats should be distributed randomly across races and sexes.

In fact, it is even possible that the null hypothesis is correct but that we will find minority owners programming for minority audiences more frequently than do white males. The models of programming choice described in the sections xx, above, showed that as the number of outlets increased, minority programming tended to become more and more profitable for broadcasters. We shall find in section yy,[94] below, that the FCC's policies of increasing the number of stations may have spurred more minority programming. The Commission, using its minority preferences in comparative hearings, may have given a large number of the new broadcasting stations to minorities.[95] These new owners may have found that the most profitable thing to program was minority programming. Hence, we might find new owners of

broadcasting, themselves racial or ethnic minorities, choosing to program for minority audiences, even though the new owners desire only profits and have no cost advantage in programming for minority groups.

2. Race and Sex Might Be Important Because of Consumption Behavior

Female or minority station owners might be motivated consumption, as well as profit maximization. This might be because of a desire to see programming that appeals to the owner get on the air, or it might be out of a feeling of "solidarity" with the owner's group. Women might feel that they owe it to their oppressed sisters to broadcast female-oriented material, regardless of whether or not some profits must be sacrificed. And Black, Hispanic, etc., owners might have similar feelings about broadcasting for other Blacks, Hispanics, and so forth. But whatever the source of these feelings, such owners might be willing to sacrafice profits to present minority-interest programming.[96]

How would such an insight be worked into the models discussed above? We will work with a modification of Bebee's paper, mainly because it seems the easiest to adapt and demonstrate the probable changes. Within his model, we would designate a minority owner as "M", and assume that M will choose to program minority taste programming (that which is the first choice of the smallest group) as long as it garners an audience size that is at least within X viewers of M's next best alternative. To understand this approach, we will work through several examples that rely on table ____, below, which is a slight modification of the scheme in Bebee's article.

Table 6 here

We will systematically work through several examples, each assuming that there are three competitive broadcasters. First we will compute the expected equilibrium, given assumptions about the size of viewer groups and the configuration of viewer preferences. Then we will ask how the analysis might change if one of the broadcasters were a minority group member.

Example 1A -- Viewers watch only first choice, and viewer groups are highly skewed.

If we have viewer preference pattern 1, with group distribution A, and there are 3 channels, each run by a profit maximizing competitor, the competitors will produce program type 1 on three different channels, and split 8,000 viewers three ways = 2,666 viewers, each. Now, let us assume that one of the broadcasters is M, who by definition comes from the smallest group, 5. M has a desire to show programming for his group. If he does so, however, he will get only 12 viewers, a drop of 2,654. Only if M has an extremely intense preference for this

sort of consumption will he show type 5 programming. If he does this, the remaining two broadcasters will get 4,000 viewers, each, by showing programming type 1.

Example 1B -- Viewers watch only first choice, and viewer groups are skewed.

If we have viewer preference pattern 1, with group distribution B, the three competitors will show two versions of programming type 1, and one version of programming type 2. Each broadcaster will get 2,500 viewers. Now, if one of the broadcasters is M, he must be willing to get only 313 viewers instead of 2,500, a drop of 2,187, to broadcast programming type 5. If M were to show type 5, the remaining two profit maximizing would either both show type 1, producing 2,500 viewers each, or one broadcaster would show type 1 and the other would show type 2, producing 5,000 and 2,500 viewers, respectively. (The broadcaster who would show type 2 would be indifferent between doing so or showing type 1, for both strategies produce 2,500 viewers. The broadcaster who shows type 1 can do no better than this, regardless of what the other broadcaster decides to do. The expected audience size would therefore be (5,000+2,500+2,500+2,5000)/4 = 3,167 for each, assuming that the two strategy sets were equally probably.)

Example 1C -- Viewers watch only first choice, and viewer groups are distributed nearly rectangularly

If we have viewer preference pattern 1, with group distribution C, the three competitors will show one version each of programming type 1, 2, and 3. The broadcasters will get 1,077, 970, and 872 viewers. If one of the broadcasters is M, his decision to program type 5 will get only 707 viewers. The number he would have to give up depends, of course, on whether M would show type 1, 2, or 3 if he were to forgo showing type 5. If we assume that the three alternatives are equally probable, we can calculate M's expected audience from forgoing type 5 as (1,077 + 970 + 872)/3 = 973. Hence, M would need to give up 973-707 = 266 to show type 5. If he were to show program type 5, the remaining two profit maximizers would show types 1 and 2, and would get 1,077 and 970 viewers.

These three examples should, first, illustrate how we are including the minority status of owners within the model. Second, they produce an important insight:

Insight 1 As the distribution of viewer tastes becomes more rectangular, minority owners need to sacrafice less to satisfy a taste for programming for minority listeners.

In example 1A, M had to sacrafice 2,654 viewers (=26.5% of total) to show type 5. In example

1B M had to give up 2,187 (=22.6% of total) to show type 5. And in example 1C, M had to give up 266 (=6.0% of total). Clearly, the "cost" of showing type 5 falls as the distribution becomes more rectangular. This means that, for example, it will be far less costly for a Black owner to broadcast Black oriented material in areas with substantial Black populations, such as Los Angeles or New York, than in areas with relatively fewer Blacks, such as Phoenix or Salt Lake City.

Example 2A -- Viewers have unique second choices, and viewer groups are highly skewed.

If we have viewer preference pattern 2, and group distribution A, three competitive programmers will show three versions of type 1 programming and get 3,200 viewers each. (Recall that viewers in group 2 will watch type 1 programming if no type 2 is available.) If one of the broadcasters is M, he will have to give up 3,188 viewers (= 3,200 - 12) to satisfy his preference for showing type 5. If he were to do so, the remaining two profit maximizing broadcasters would each show type 1 and get 4,800 viewers, each.

Example 2B -- Viewers have unique second choices, and viewer groups are skewed.

If we have viewer preference pattern 2, and group distribution B, three competitors will show two versions of type 1, getting 2,500 viewers, each, and one version of type 2, getting 3,750 viewers. The expected audience size is therefore (2,500+2,500+3,750)/3 = 2917. If one of the broadcasters is M, he must give up at least 2,917 - 313 = 2,604 viewers to show type 5. If he were to do so, the remaining two broadcasters would show one version of type 1 and one version of type 2, garnering 5,000 and 3,750 viewers, respectively.

Example 2C -- Viewers have unique second choices, and viewer groups are distributed nearly rectangularly.

If we have viewer preference pattern 2, and group distribution C, three competitors will engage in a cycle, showing types 1, 2, 3, and 4 each 75% of the time. The cycle will be (1,2,3) -> (2,3,4) -> (1,3,4) -> (1,2,4) -> (1,2,3).[97] This gives an average of 926 viewers per broadcaster. If one of the broadcasters is M, he must give up 926-707 = 219 to show type 5. If he were to do so, the remaining cycle will be (1,2) -> (2,3) -> (1,3) -> (1,2), producing an average of 973 viewers for each of the two remaining broadcasters.

Example 3A -- Viewers have a common denominator choice, and viewer groups are highly skewed.

If we have viewer preference pattern 3, and group distribution A, three competitors will show three versions of type 1 programming, attracting 3,332 viewers to each channel. If one of the broadcasters is M, he must give up 3,332-12 = 3,320 viewers to show type 5. If he were to do so, the remaining two broadcasters would both show versions of type 1, and get 4,992 viewers apiece.

Example 3B -- Viewers have a common denominator choice, and viewer groups are skewed.

If we have viewer preference pattern 3, and group distribution B, three competitors will show three versions of type 1, getting 3,229 viewers, each. If one of the broadcasters is M, he must give up 3,229-313 = 2916 to show type 5. If he were to do so the remaining two broadcasters would each show type 1 and get 4,687.5 viewers.

Example 3C[98] -- Viewers have a common denominator choice, and viewer groups are distributed nearly rectangularly.

If we have viewer preference pattern 3, and group distribution C, three competitors will show three versions of type 1 and get 1470.3 viewers each. If one of the broadcasters is M, he must give up 1,470.3 -707 = 763.3 viewers to show type 5. If he were to do so, the remaining two broadcasters will each show type 1 and get 1,852 viewers.

Table 7 reveals the pattern that emerges.

Table 7 here

Table 7 clearly supports insight 1; as viewers are distributed more nearly rectangularly, the cost of serving minorities falls. This remains true regardless of the viewer preference pattern. But Table 7 also provides some support for another insight.

Insight 2: Serving minority groups becomes more costly if viewers are willing to watch common denominator programming.

The figures in column 3 provide support for insight 2. The reason for this is quite intuitive. If viewers are all willing to watch common denominator programming, M is forced to forego viewers from all other groups when he chooses to show type 5.

Now, consider what would happen if one of the two remaining broadcasting licenses in each market were to be given to a second minority group member, named M2. Table 8, below, gives the percentage of the viewership market that M2 would have to give up to satisfy a taste forshowing type 5, on the assumption that M has already decided to show type 5.

Table 8 here

Note that M2 must give up more, and ususally much more, to provide a second source of type 5 to every type of market. This is due to two factors. First, M2 must forgo his share of the increased audiences that watch the remaining profit maximizing broadcasters. Second, he must share group 5 with M.

Even if M2 were to decide to pay this cost, it is by no means clear that two versions of type 2 would be broadcast. Once M2 begins broadcasting type 5, M must also pay the "prices" that we listed for M2. M's share of group 5 has been cut in half by M2's actions, and if M were to choose the pure profit maximizing strategy he could get the big audiences that two profit-maximizers get to split. Hence, once M2 broadcasts type 5, M may choose to broadcast profit-maximizing material. In sum, we get

Insight 3: Adding a second minority broadcaster into a market is less likely to produce a second source of minority programming than adding the first minority broadcaster was likely to produce a first source of minority programming.

Other examples can provide another pair of important insights.[99]

Example 4 -- Viewers will watch only their first choices, and viewers are distributed nearly rectangularly.

If we have viewer preference pattern 1, and group distribution C, but there are four channels run by four competitive broadcasters, the competitors will show types 1, 2, 3, and 4. If we then were to add a fifth channel and a fifth broadcaster, the fifth broadcaster would show type 5. If the fifth broadcaster happened to be M, we would observe M choosing to show type 5.

In example 4, the expansion of channel capacity makes it profitable to show minority interest programming. M's decision to do so, however, reveals nothing about his motivation. M might be a profit maximizer, and his decision to show type 5 might be nothing more than good business judgment. This leads us to

Insight 4: Observing that new channels in a market are allocated to minorities who choose to program for minority audiences does not necesarilly support the presumption that minority broadcasters have a taste for minority broadcasting.

Example 5 -- Viewers will watch only their first choices, and viewers have a skewed distribution.

If we have viewer preference pattern 1, and group distribution B, and there are 15 channels run by competitors, and a broadcaster must get at least 600 viewers to break even, the broadcasters will show 8 versions of type 1, 4 versions of type 2, 2 versions of type 3, and 1 version of type 4. They will draw 625 viewers, each. If one of the broadcasters is M, he will have to sacrafice 625 - 313 = 312 viewers to show type 5. This amounts to half of his expected audience, but only 3.2% of the audience total. This is far less than the 22.6% of the market M would have to give up if there were only three broadcasters.

Example 5 leads directly to

Insight 5: Increasing the number of outlets reduces the cost to minority broadcasters of satisfying a taste for serving minority consumers.

Putting together insights 1 through 5, we can see that a policy of awarding broadcasting licenses to minorities as a means of increasing minority broadcasting is most likely to work when the market has a substantial minority population that is currently unserved, despite the existence of many outlets in the community. However, if we simultaneously increase the number of outlets in a community and give one or more of the new outlets to minority owners, we cannot know, a priori, whether any new service to minorities is due to the increase in outlets, or is due to a taste for minority programming on the part of the new owners.

3. Race and Sex Might be Important Because of Production Cost Advantages

This explanation suggests that minority group members might tend to program for members of their own group because minority owners have lower costs of doing so than do white males. Because costs are less, break-even audience sizes will be smaller, and a minority format that looks like a money-loser to a white male will appear profitable to a minority owner.

When and why would this explanation be right? After all, a skeptic might suggest, a white male owner can hire Black, latino, asian, or female program managers. These managers could program for minority audiences, utilizing whatever special virtues membership in the minority group bestows on the manager to raise the station's ratings to the highest possible level. Specially talented minority managers would be rewarded with special salaries by profit maximizing white male owners. In sum, being a minority owner will provide no advantage -- or, at best, an advantage equal to the cost of hiring a manager (less the owner's best alternative wage).

The skeptic's account is incomplete. There is a substantial literature in economics and law about the difficulties of monitoring an agent's performance.[100] Principles never know with certainty how well an agent is performing, and must make guesses about rewarding or punishing an agent based upon the performance of the enterprise. Because the performance of the enterprise depends upon many other factors, some of which are random, the principle has a difficult task. Anything that reduces the cost to the principle of evaluating the agent's performance will give the principle a cost advantage in production.

I suggest that the production cost explanation is strongest when membership in a minority group gives a minority owner an advantage in monitoring the performance of a station manager. This explanation varies in liklihood and in strength for different minority groups.[101]

a. Spanish Language (and Other Non English Language) Broadcasters

First, consider the case of non-English language stations, most of which are Spanish language. These stations broadcast to particular minority communities that are isolated from mainstream, majority culture not only by customs and housing patterns, but also by language. A white (male) owner who (I presume) does not know the language, and who almost certainly does not live in the minority community and share in emerging social customs, trends, and fads, will be a great disadvantage in trying to judge the performance of a minority broadcast programmer. The owner will not even be able to understand the content of his own station. Even if he could, he will have no way of judging the quality of his programmer's strategy for attracting large numbers of minority listeners and viewers. After all, the programmer might be spending very little mental effort on his task, choosing to program safe, boring, middle of the road fare, despite changes in the community that would enable a different strategy to capture greater ratings. The white owner would have no way of knowing whether or not this were true. In contrast, a minority owner who (I presume) speaks the language and comes from the community, would suffer no such disadvantage.[102]

b. Black Community Broadcasting

Second, Black owners who broadcast for Black communities probably have similar, but smaller, comparative advantages to those enjoyed by Hispanic owners who broadcast in Spanish. American Blacks tend to live in distinct areas and produce separate cultural trends.[103] "Rap music" is probably the most obvious example to the white majority within the last few years, but the more general point is always true. Many American Blacks also speak a dialect of English that is significantly different from the English spoken by white

Americans.[104] These factors will combine to give many American Blacks an advantage at monitoring the performance of a manager who is programming for the Black community. However, these advantages will be smaller than those enjoyed by Hispanic owners because Black English is much closer to white English than is Spanish, and because many American Blacks who have enough money to purchase a broadcasting station will tend to come from middle and upper class communities that share much more with white America than does the lower-middle and lower class Black audiences that make up the target audience of Black programming.[105] In addition, the tastes of Black audiences for radio programming has been moving a bit toward the white mainstream, to the extent that Black radio programmers have been forced to play songs by white artists to lure Black listeners.[106]

c. Female Broadcasters

Women broadcasters who program special material for other women comprise one of the most difficult cases. Women, as a group, are much more diverse, numerous, and dispersed than are the other groups I have discussed. For these reasons it is much less clear (to this author) exactly what women's programming includes. I suppose programs geared to the special biological concerns of women -- menstruation, childbearing, breastfeeding, menopause, diseases of female organs, etc. -- would be included. Perhaps programs aimed at special social and economic concerns of women would be included. But these programs, alone, can not fill in even a substantial portion of a radio or TV format. Some entertainment programming would also need to be included, but there is very little that would seem to appeal only to women. The most likely examples of network shows with strongly female audiences are "Cagney & Lacey" and "Kate and Allie",[107] but these shows also drew very large numbers of men.

I suppose that the social and economic discrimination suffered by many women might give a femal owner some advantage in monitoring the performance of a manager who is programming for the female audience. But because women, as a group, speak essentially the same language that men do, and live in the same places, it is unclear why any such monitoring advantage should be large.[108]

d. Modelling the Cost Advantage

How should we incorporate a cost advantage in monitoring managers into the models of broadcast competition? A cost advantage plays exactly the same role as a taste for broadcasting minority programming. In part ____, above, I modelled a taste for minority programming as the willingness to give up a number of viewers by doing so. A profit-maximizing broadcaster who has a cost advantage at broadcasting to minority audiences will be willing to

give up viewers to do so, other things being equal, if the lost advertising revenues are less than his cost advantage. A large cost advantage translates into a willingness to give up many viewers, just as does a strong taste for minority programming. Thus the general lessons from the models in part ____ should be applicable here.

A policy of awarding broadcast licenses to minorities and women so as to increase programming targeted at these groups will be most effective in a market with substantial minority populations that are currently unserved by any of the large number of outlets in that market. In addition, to the extent that the policy depends upon cost advantages, it will be most effective for owners from non-English language minorities, slightly less effective for Black owners, and least effective for women owners.

4. Potential Problems with the Models

Are these theoretical results of interest to a court that is testing the minority preference policies, or are there serious problems that prevent using the theories to analyze the policies? Several potential problems suggest themselves:

a. Federal Communication Commission policies may affect the choice of programming by profit maximizing broadcasters. First, applicants for broadcasting stations may believe that proposing to present minority programming increases the chance of gaining the license. Similarly, incumbent broadcasters may well believe that presenting some minority programming increases the chance of a smooth, low-cost renewal. In fact, the FCC has gone so far as to suggest that every broadcasting station must program some minority material.[109] Second, some other FCC policies may have increased the cost of presenting minority programming. For example, the FCC now claims that its administration of the fairness doctrine raised the cost of presenting nonmainstream political views to the public.[110]

b. The models are all aimed at predicting service to groups with minority tastes for broadcast programming. But the minority preference policies aim at racial and ethnic minorities and at women. The correspondence between these two sets of groups may vary greatly, depending upon the groups involved. As I suggested in section xx, above, in the Spanish-speaking population, demand for Spanish programming may be quite high and quite distinctive. But among women, there may be very few programs that are commonly desired.

A second, and related difficulty with these models is that their definition of "minority" programming as that desired by a minority may fail to capture the subtle differences that might support the minority preference policies. It may be that minority and female owners

would program the same types of material as white males, but would do so in slightly different ways. For example, in presentation of the news, there might be a subtle difference of slant, so that interpretations of events more congenial to minority or female interests were presented. Viewers and listeners might be indifferent to the difference (in terms of the decision about whether or not to view or listen), but still might garner a somewhat different set of views about the world from watching or listening.[111]

c. The models neglect the influence of cable television and other methods of delivering minority programming. After all, one can purchase Spanish language records and tapes. To understand how cable, records and tapes would affect the analysis, hold the number of viewers or listeners of type 1 through type 4 constant. Now, presume that all listeners or viewers of type 5 material do not regard commercial announcements as a cost, but are highly sensitive to the out-of-pocket costs of puchasing cable, records or tapes. In this case, if no one in a market is showing type 5 material, and a broadcaster is considering doing so, the broadcaster could pick up all of the minority viewers or listeners by showing type 5. On the other hand, if the listeners or viewers of type 5 are sensitive to the implicit costs of commercial announcements, some will choose to purchase commercial-free material, and remove themselves from the pool of viewers or listeners to type 5 over-the-air. Type 5 will then appear less attractive to broadcasters.

Now, if we introduce cable, tape, and record alternatives to type 1 through type 4 into the analysis, we would need to determine how many potential listeners or viewers were removed for these types, as compared to type 5, before we could determine whether or not type 5 programming became more or less likely. The analysis will likely become quite complex.[112]

I suspect that the problems with these models are enough to cause many social scientists to blanche at the idea of using them. However, in this article I am not trying to figure out whether the state of the art would satisfy a social scientist, but rather whether a court might be willing to use the theories and data to uphold a law under attack. And for such a purpose, these models of the effect of race and sex on an owner's programming decisions may provide enough of a basis for a court to proceed to examine the data.

E. DATA ON OWNERSHIP CHARACTERISTICS AND BROADCASTING CONTENT

1. Early Data

The few sources of data on the relationship between ownership characteristics and broadcast content suggest nothing inconsistent with the model I have presented above. In an

article published in 1978 Lawrence Soley and George Hough III[113] ascertained that the number of Black-owned radio stations[114] had grown from 12 in 1970 to 56 to 1977. They produced the following table, showing that the vast majority of Black-owned stations were purchased.

TABLE 9 [115]

Method of Acquisition by Black Broadcasters

	Before 1970	70-71	72-73	74-75	76-77	Total
PURCHASE	2	1	13	15	8	39
OTHER[a]	10	2	0	1	4	17

[a]Includes new frequency assignments, bankruptcy acquisitions, and transfers without compensation.

Soley and Hough report that "[a]ll but two of the stations acquired between 1972 and 1977 have had Black-oriented formats, programming primarily rhythm and blues, soul, jazz or gospel music."[116] Thus, there was a significant connection between Black ownership, and this connection could be consistent with either a "taste" for broadcasting to one's own group, or with a cost advantage at broadcasting to one's own group. Soley and Hough also suggest that a disproportionate number of Black-owned stations were in the top 50 markets. These markets tend to include large cites that have substantial Black populations. Recall that satisfying a taste for minority broadcasting or exploiting a cost advantage at minority broadcasting is easier in a market with a substantial minority population. Thus, the location of the Black-owned stations is also consistent with the model.

A 1981 article by Loy Singleton directly measured public service programming on Black-oriented radio stations, as contrasted with other radio stations, and found no difference.[117] Singleton concluded that granting more broadcasting stations to minority group members would not increase the amount of public service programming to minorities. His research, however, is so seriously flawed that no such conclusion can be drawn. The best that can be said for it is that it is consistent with any hypothesis about the connection between ownership characteristics and programming.[118]

Another 1981 article, by Schement and Singleton[119], measured public service programming by white and Latino owners of Spanish language radio stations, and found no difference between the two. These results are also consistent with any hypothesis about the connection between ownership characteristics and programming.[120]

2. Congressional Research Service Study[121]

Recall from the discussion in part ____ that when the DC Circuit remanded the Steele case to the FCC, one of the central purposes of the remand was to allow the FCC to develop data on the relationship between ownership characteristics and programming content. To do that, the FCC sent questionaires to all radio and television licensees, requesting data about the percentage of ownership interest in the license by minority groups and women; about whether the distress sale, comparative hearing preference for women and minorities, or tax certificate policies were "involved" when the station was acquired; (for radio) about the format; and (for all stations) about any programming specially targeted at minorities, women, children, or senior citizens.[122] Seventy nine percent of all stations responded, but when Congress passed Joint Resolution 395 at the end of 1987, the FCC had to terminate its inquiry.[123] The Subcommittee on Telecommunications of the House Committee on Commerce and Energy then directed the Congressional Research Service ("CRS") to analyze the responses, and June 29, 1988 the CRS released the results.

The CRS report first compares the rates at which white male, minority, and female broadcast station owners choose to program for minorities, women, children, and senior citizens. The CRS lumped together all broadcaster responses into one big pool, rather than segregate them by market. The CRS claims that it was forced to do so because the FCC study elicited insufficient market identification and demographic data to make segregation by market feasible, and no alternative source of such information was available at low cost.[124] To partially make up for this deficiency, the CRS chose five large markets[125] and five small ones,[126] ran the same comparisons of programming choices of white male and other station owners within each market, and then compared the level of minority programming to the percentage minority population in each market. This last comparison was ostensibly an attempt to ascertain to what extent minority programming was "market driven", rather than by ownership characteristics.[127]

To make this paper manageable, I will try to summarize the masses of data presented in the CRS report. However, for some of the general statements I will make, there will be one or more specific counterexamples.

a. Aggregated Data For All Stations

The following chart summarizes the CRS findings on the number of broadcasting stations in which minorities hold broadcasting interests.

Table 10 [128]

Number (percent) of total stations reporting minority ownership

	less than 51% ownership	51% or more ownership
Black	496 (5.7%)	166 (1.9%)
Hispanic	209 (2.4%)	87 (1.0%)
Asian/Pacific	87 (1.0%)	16 (0.2%)
Indian/Alaskan	62 (0.7%)	39 (0.4%)

Number (percent) of total stations reporting female ownership

less than 51% ownership	51% or more ownership
3,091 (35.4%)	619 (7.1%)

Total = 8,720 stations reporting. 7,558 reported no minority owners. Female ownership was not broken down by race.

Most of these figures for 51% or more ownership are consistent with recieved wisdom, but the numbers for minority, and especially female ownership interest at 50% or less seems higher than most people in the industry believe.

The aggregated comparisons for ownership characteristics and programming choices show several general trends. First, minority owners are more likely to program for their own minority groups than other owners are. For example, 79% of all stations owned (51% or more) by Black owners target Black audiences. Only 20% of non-Black owned stations target Black audiences. Second, minority owners (51% or more) are no more likely to program for <u>other</u> ethnic groups than are nonethnic owners. For example, consider the following table.

Table 11 [129]

Percent of Station In (>50%) Ownership Groups Broadcasting Black Programming

non-Black	Black	Hispanic	Asian/Pac	Ind/Alask	Women
20	79	8	13	13	25

The results for all ethnic groups are listed in table 12, below.

The results also suggest that women are somewhat more likely to program for other women than are men, but that women are not, in general, much more likely to program for minorities.

Table 12 here

Which of the three hypotheses about minority and female broadcast station owners -- no difference, taste, and cost advantage -- are consistent with these results?

i. No Difference Hypothesis

It is possible, but not very likely, that the no difference hypothesis can be consistent with these results. First, some third explanatory variables that have been left out of the model might produce these statistical patterns. For example, it is possible that minority and (to a lesser extent) female licensees have smaller, lower power stations than white males. Small stations might be much better suited to targeting minority and female audiences than large stations, so the tendency for minority owners to program much more for minorities might be explained, in part, by the size of the stations. Such an explanation fails, however, to explain why minority owners should program so much more for their own groups, and less for others.

Example 4 from part ___, above, provides a second possible way of reconciling this data and the no difference hypothesis. That example showed that if we increase the number of channels in a market, minority broadcasting may become profitable for the first time. If the new channel is allocated to a minority broadcaster, that broadcaster will choose to broadcast minority interest programming even though he is a pure profit maximizer who has no particular cost advantage. Could such a scenario have been played out in American broadcasting over the past 10 to 20 years? That period of time covers the years when the minority preferences were in effect. Over the past 10 years the number of commercial television stations has grown from 711 in 1977 to 986 in 1987, AM radio stations have increased from 4,559 in 1977 to 4,866, and FM stations have climbed from 4,117 in 1977 to 5,208 in 1987.[130] Perhaps many of the new stations were given to minorities, who just happened to be in markets where minority broadcasting was rendered the most profitable alternative by the grant.

Although such an explanation is possible, there are several good reasons to be skeptical. First, it relies on a coincidence of the same scenario being played out in market after market. Second, it does little to explain why minorities are broadcasting to their own groups so much more than other minority groups. This explanation should suggest that Black broadcasters would program for Hispanics and other minorities quite frequently, but the data does not bear

this out. Last, the early article by Soley and Hough[131] found that the vast majority of Black broadcasters bought their stations. If this trend continued it would be inconsitent with the no difference hypothesis. However, to truly rule out the no difference hypothesis, some market-by-market empirical work would need to be done. But until that work is done, I will regard the no difference hypothesis as unlikely.

ii. Taste

Much of this data is consistent with the taste hypothesis we developed in part _____, above. Minority broadcasters target their own groups far more frequently than others do. A sense of group identification, a psychological need to communicate with one's own community, a desire to teach one's own group, a sense of pride in the ethnic group's music and culture, etc., could all explain why minority owners prefer to target their own groups. I have no a priori expectation of why female owners' taste for targeting women should be weaker (or stronger, for that matter) than minority owners' taste for targeting their own communities.[132]

iii. Monitoring Cost Advantage

The CRS data tracks closely the predictions of the monitoring cost advantage explanation. Hispanic owners, who were predicted to have the largest cost advantages, are 7.4 more likely to target Hispanic audiences than are non-Hispanic owners. Black owners, also predicted to have significant but slightly smaller cost advantages, are almost four times as likely to target Black audiences as are non-Blacks. And women, who were predicted to have only slight cost advantages, are only 1.2 times as likely to broadcast to women as are men. This theory did not predict that minority or female owners would be more likely to target other groups, and the data does not show that they are, in general. In sum, the monitoring cost advantage hyppothesis does a pretty good job at explaining the data.[133]

b. Data From Five Large and Five Small Markets

The CRS ran comparisons similar to those just described for all broadcasting stations in five large and five small markets. The results for the large markets were quite similar to the results for the entire nation, but in the small markets there were so few stations with minority owners that the comparisons are rendered meaningless.[134] When the CRS compared the rate of broadcasting to minorities in the large markets with the percentage population in the market, it found that nonethnic owners tended to broadcast to minorities at a rate equalling the minorities' percentage in the population. Ethnic owners tended to target minority audiences at a higher rate.[135]

c. The Data Might be Worthless

One possibility is that these results are consistent with everything because they are inherently unreliable. There is no definition of minority programming in the study, and all data is self-reported by licensees. No attempt was made to cross check the reliability of the reported data. Indeed, an such cross check would have required a working definition of minority programming. Hence, it is possible that the CRS study is picking up nothing more than different perceptions of minority owners, or different self-reporting rates of minority owners.

The CRS study data on the most commonly used format by Black owners -- jazz -- partially reinforces these concerns. Jazz is definitely a crossover format, like urban contemporary, utilized by large number of Black and white listeners.[136] Black owners who program jazz may regard themselves as targeting a Black audience, while white owners who program identical matter may have no such self-perception. And Hispanic owners who program jazz may have something else in mind.

In addition, there is the possibility that owners gave strategic responses. This questionnaire may have been percieved as a policy-making tool by the owners, who may have dissembled in an effort to shift federal policy toward minority preferences in broadcasting.[137]

3. Summary and Conclusions

The problems with the extant data would prevent any reputable social scientist from placing much weight upon them. But a court, faced with the need to come to a decision about the legality of the minority preference policies, would have to go ahead and take another look at them. Even so, the early data do virtually nothing to shed light on which of our three theoretical positions -- no difference, taste, or monitoring cost advantage -- is most likely. The CRS study is a small advance, and suggests that either the taste hypothesis or the monitoring cost advantage, is most likely (although the no difference position cannot be ruled out completely). In particular, the monitoring cost explanation does the best job of predicting the general pattern of CRS results. However, because the CRS failed to evaluate its data against the background of a microeconomic model such as the one presented in this article, we have no way of knowing how large such a monitoring cost advantage is likely to be for each of the groups, or, similarly, how strong is the taste for broadcasting to one's own group.

The next section will explore how a theoretical and evidentiary record such as this will work into a constitutional test of the minority preference policies.

III. THE CONSTITUTIONAL LAW OF AFFIRMATIVE ACTION AND THE ROLE OF EVIDENCE ON THE RELATIONSHIP BETWEEN OWNERS' CHARACTERISTICS AND PROGRAMMING CHOICES

This section will provide a synopsis of the Constitutional law of affirmative action programs, and then apply that learning to the question of the constitutionality of minority preferences in broadcasting.[138] We will see that under some value choices, the nexus between minority ownership and programming choices is irrelevant, while under other value choices the evidence about the nexus crucial.[139]

A. FROM BAKKE TO CROSON

There are only four supreme court cases evaluating the constitutionality of programs that use explicit racial classifications so as to help minority groups and disadvantage whites.[140] To provide readers who are inexpert in this corner of constitutional law a feeling for the discussion that follows, I must first sketch the facts and holdings in these four cases. To those who are experts, I must apologize in advance for what may appear at times an over-simplification, but the collected opinions in these four cases total close to 400 pages in the official reports, and boiling them down to something useful leaves out a lot.

1. Regents of University of California v. Bakke[141]

The Bakke case tested the legality of a medical school affirmative action program. The UC Davis medical school set aside 16 places in its class for minorities, only. Whites could compete for the other 84 places. Bakke, a white man, was denied admission despite having test scores and grades far above those of the minority students accepted into the 16 reserved places. Bakke sued, claiming his rejection was a violation of the 14th Amendment.

Justice Powell found that strict scrutiny was appropriate when testing an explicit racial classification, regardless of who was helped or burdened. Powell distinguished cases remedying specific, documented prior discrimination in schools or employment,[142] and listed the proffered compelling state interests for the UC Davis program:[143]

> (i)"reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," . . . (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.

Powell rejected the first as forbidden discrimination "for its own sake." Powell rejected the second, as unbounded. The third was rejected because there was no evidence in the record to suggest that the minority physicians would be more likely to practice in minority communities than would whites (although it might be true) and because there may be ways to find applicants who have a desire to work in minority communties without using explicit racial classifications.[144]

Justice Powell accepted the fourth goal -- attainment of a diverse student body -- as a "compelling interest" for a state school. Much informal learning takes place through casual interaction, and a diversity of backgrounds in student bodies produces more learning. But, Justice Powell cautioned, race must not be the only factor, for other elements aid learning, also. Therefore, race must be balanced and weighed against other elements, such as "personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor,"[145] and cannot insulate some candidates from comparisons with other candidates. The Harvard admissions procedure, said Powell, provides a good model.[146]

Justice Brennan, joined by Justices White, Marshall, and Blackmun found that the U.C. Davis plan was constitutional by applying a form of intermediate scrutiny: "racial classifications designed to further remedial purposes '"must serve important governmental objectives and must be substantially related to achievement of those objectives."'"[147] Remedying the effects of society-wide discrimination provided an important governmental interest if the discrimination produces a disparate impact upon the races in the government's programs. Here, said Brennan, U.C. Davis could conclude that the low rate of admissions of minorities was due to the effects of past discrimination.[148] Under these circumstances, U.C. Davis could explicitly take race into account in admissions decisions, even though some white applicants might be excluded. This is because white people's expectations of admission are based upon the lingering effects of past discrimination -- effects that the government is trying to eradicate.[149]

Brennan held that U.C. Davis had a sufficient factual predicate for concluding that the low rate of minority student admissions in medical schools stemmed from discrimination. First, there were statistics comparing the rates of Blacks and other minorities in medical schools and in medicine in the United States with the size of the Black population.[150] Second, there was the history of discrimination against Blacks and other "minorities in education and in society generally, as well as in the medical profession."[151] Nothing else was needed to show a connection between these two sets of facts.

Next, Brennan found that the U.C. Davis' program's use of race placed no unfair burdens on anyone involved. The program stigmatized neither minority applicants nor whites.[152] And Bakke's life was unlikely to be seriously affected, so there was no great fairness concern for him.

Last, Brennan concluded that the U.C Davis program was reasonably related to its goals, in part because there was no way of satisfying the goal of integration without taking race into account, and in part because the U.C. Davis admissions program considered "on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination."[153]

2. Fullilove v. Klutznick[154]

In May of 1977 Congress enacted Public Works Employment Act of 1977,[155] which authorized spending $4,000,000,000 for federal grants to state and local governments for public works projects. In other words, this was delegated pork barrell. Section 103(f)(2) of the Act, termed the "minority business enterprise" (MBE) provision, required that 10% of all expended funds be spent on minority owned businesses, unless that turned out to be infeasible.[156] Some associations of construction contractors filed suit, claiming that the MBE violated the Equal Protection Clause of the Fourteenth Amendment and the equal protection "component of the Due Process Clause of the Fifth Amendment."[157]

Chief Justice Burger's opinion, joined by Justices White and Powell, first reviewed at length the circumstances surrounding the adoption of the MBE provision. Congress had intensely scrutinized the fairness of allocations, primarily between geographic regions,[158] but also between ethnic groups. The MBE provision's sponsor had pointed to the general disparity between the size of the United States' minority population (15%-18%) and the percentage of federal procurement going to minority business enterprises (under 1%), and had argued that a 10% set aside was in keeping with established practice under the SBA.[159] Burger spent five pages showing that Congress intended to remedy lingering effects of racial discrimination on today's economy,[160] and then a few more reviewing the Secretary's regulations -- particularly the waiver provisions allowing contractors relief from the MBE provision.

Burger pointed out that this program originated under the Spending Power of the U.S. Constitution,[161] an independent grant of power to Congress which reaches as far as any of the regulatory powers of Congress, such as the Commerce Power.[162] The Commerce Power, said Burger, clearly gives Congress the power to regulate prime contractors on federally funded projects. As to state and local governments, section 5 of the Fourteenth Amendment provides power. When legislating to remedy lingering effects of discrimination, "Congress, of

course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings."[163] But Burger did point out that Congress had data on disparity of contract procurment at federal, and also at state and local levels, from which it could conclude that this regulation was needed. Burger was clearly worried about the thinness of the factual record, but pushed the worries aside with references to the power of Congress in this area. He then pointed out that there was precedent implying that even though the prior discrimination may not have been unlawful at the time, Congress may act to remedy the effects.[164]

Burger upheld the the MBE provision's means of using explicit racial classifications, but in doing so he refused to rely on any of the legal formulas from Bakke.[165] Instead, he stressed the role of administrative process. Burger argued that the administrative flexibility included within the system helped ensure the MBE provision's constitutionality.[166] In particular, the MBE provision's overinclusiveness -- its tendency to give advantages in circumstances where they are not warranted -- was all right because the two fundamental congressional assumptions (1) that "the present effects of past discrimination have impaired the competitive position of"[167] minority-owned businesses, and (2) that "affirmative efforts to eliminate barriers to minority-firm access, and to evaluate bids with adjustment for the present effects of past discrimination, would assure that at least 10% of the federal funds . . would be"[168] awarded to bona fide MBEs -- could be rebutted in the administrative process. The administrative flexibility helped assure that fairness, justice, and the laudable purposes of the MBE provision would be protected in individual cases.

Justice Powell, concurring, emphasized that racial classifications are prohibited unless justified by compelling governmental interest. A naked desire to prefer one group over another will not do,[169] but remedying effect of past discrimination will if there is finding of legislative or constitutional violation, and a narrowly tailored means is chosen. Congress had power to find, and did find, much evidence of illegal discrimination. These findings need not appear in the legislative history of this statute; earlier legislative histories count, as well.[170] Powell admitted that "[a]lthough the [illegal] discriminatory activities were not identified with the exactitude expected in judicial or administrative adjudication,"[171] the discrimination was found with enough certainty to support a Congressional statute.[172]

Justice Marshall, joined by Brennan and Blackmun, concurred in the judgment. Marshall argued, on the basis of his Bakke opinion, for middle tier scrutiny of explicit racial classifications that disadvantage whites; the classification "for remedial purposes [must] serve important governmental objectives" and must be "substantially related to achievement of those objectives."[173] Congress had more than enough data from which to conclude that the small per-

centage of federal construction dollars was the product of prior discrimination, and the 10% set aside was closely related to eradicating the effects of discrimination, said Marshall.

Justice Stewart, joined by Justice Rehnquist, dissented, arguing first that racial classifications are per se void. But even if not, Congress had no evidence of prior discrimination by Congress in disbursing federal contracting funds, a necessary element of a remedial justification.[174] General, societal discrimination will not do as a constitutional substitute for Congressional discrimination.[175]

3. Wygant v. Jackson Board of Education[176]

The Wygant case suggests a substantial change of attitude toward affirmative action within the Supreme Court.

In 1972 the Jackson Board of Education struck a deal governing layoffs -- termed Article XII -- with the teachers' union. That deal called for the layoff of white teachers with seniority to protect the jobs of Black teachers without seniority in order to maintain the Black/white balance among schoolteachers employed by the Board.[177] But, in 1974, when layoffs were needed, the Board refused to comply with Article XII, and instead laid off minority teachers who lacked seniority. When the union sued the Board in Federal Court, the court refused jurisdiction, partially on the ground that the union had presented insufficient evidence that the Board had ever discriminated in hiring. The union then brought suit in state court. The state court found that although the Board had not discriminated in hiring, and although the low percentage of minorities on the teaching force was due to societal discrimination, remedying societal discrimination was a sufficiently good reason for upholding Article XII's explicit racial classification.[178]

On appeal to the Supreme Court, the central issue was whether Article XII violated the equal protection clause of the 14th Amendment. Justice Powell, joined by Burger, Rehnquist (who had dissented in Fullilove), and O'Connor, enunciated a "compelling state interest" test, and required that any such interest be accomplished by "narrowly tailored" means. First, Powell rejected any question that "societal discrimination alone is sufficient to justify a racial classification."[179] Instead, the focus should be on the relation between the racial composition of the teaching staff and the composition of the pool of qualified applicants. Second, Powell repudiated the "role model" theory, adopted by the District Court, that the need to provide Black students with good Black role models required the retention of Black teachers without seniority. In part, said Powell, the problem with this theory was that it was not remedial. [Question: Is this a non sequitur?] Justice Powell also claimed that the "role model" theory

might justify hiring only a small number of Black teachers whenever a school district has only a small number of Black students.[180]

When the union claimed that Article XII remedied past discrimination in employment by the Board, a valid purpose, Powell required that in "such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary."[181] But in this case, no such determination had been made. And even if it had been, the means chosen to remedy the discrimination were insufficiently tailored, said Powell.[182] Whereas the 10% set aside in Fullilove spread burdens widely, Article XII dumps huge burden on a few innocent third parties.[183]

Justice O'Connor, concurring in the judgment, also disapproved of justifying explicit racial classifications by either remedying societal discrimination or by providing role models for Black students. But she cautioned the reader not to confuse the role model theory "with the very different goal of promoting racial diversity among the faculty."[184]

Justice Marshall, joined by Brennan and Blackmun, dissented, and reaffirmed his Bakke position that explicit racial classifications disadvantaging whites should be permitted as long as they serve important governmental purposes, and use means "substantially related" to achieving those purposes.[185] Marshall painted a picture of a formerly racist Board, grudgingly agreeing to Article XII under the gun of a threatened lawsuit. In addition, Marshall argued, quite forcefully, that Article XII was the least intrusive method of safeguarding the gains in hiring young minority teachers.[186]

Justice Stevens, dissenting by himself, accepted the justification that an integrated faculty would better serve an integrated student body. Stevens (correctly) rejected the notion that this argument could justify resegregation,[187] drawing on the core values of the Fourteenth Amendment to rule out acceptance of any racist arguments.

In my opinion, the refusal of the majority to confront directly and honestly the powerful arguments in the dissenting opinions signals an important change of attitude toward affirmative action. Although the verbal formulation of strict scrutiny was left unchanged, it was applied in such an unfriendly manner that Wygant signals a change in the law.[188] Affirmative action programs, at least at the state and local level, will almost always be invalidated. The Croson case, detailed below, partially confirms this prediction.

4. Richmond v. J. A. Croson Co.[189]

Richmond, Virginia, adopted a five year plan requiring all prime contractors, other than those owned by minorities, to subcontract at least 30% of the dollar amount of any contracts with Richmond to minority business enterprises (MBEs).[190] Witnesses at the public hearings

preceeding adoption of the plan introduced a lot of evidence of societal discrimination in construction contracting, but introduced "no direct evidence of race discrimination on the part of the city . . . ."[191] The Richmond Director of the Department of General Services promulgated a regulation allowing relief from the 30% rule if the general contractor had made every "feasible" attempt to comply, but there were not enough qualified MBEs in the area to enable the general contractor to comply.[192] A plumbing contractor (J. A. Croson Co.) that was neither allowed a waiver from the 30% rule, nor allowed to raise its bid by the $7,663.16 in extra costs occasioned by the higher prices quoted by the only MBE subcontractor who was willing to bid on the project, sued Richmond, claiming that the 30% plan violated the Fourteenth Amendment of the U. S. Constitution.

Justice O'Connor, joined only by Chief Justice Rehnquist and Justice White, first critiqued[193] Burger's opinion in Fullilove, by pointing out that its validation of explicit racial classifications rested on both the "unique" remedial powers of Congress under section 5 of the 14th Amendment[194] and the flexibility built in to the 10% set aside by the administrative procedures for waiver. Section 5 of the 14th Amendment gives Congress broad authority "to identify and redress society-wide discrimination", but gives no such authority to state and local governments, who are bound by section 1 of the 14th Amendment. In effect, argued O'Connor, power was reallocated from the states to Congress by section 5. Hence, Fullilove can be distinguished, for Congress has much greater power than a city. For Richmond to prevail, it would at least have to show that it had become a "passive participant" in race discrimination by the local construction industry, and was now attempting to remedy its involvement in discrimination.[195]

Next, O'Connor, joined by Rehnquist, White and Kennedy, reaffirmed a strict scrutiny approach to all racial classifications, based in part on a "danger of stigmatic harm", but also based on the perception that this 30% plan was nothing more than racial pork barrell for the politically dominant Black majority in Richmond.[196] Then, joined also by Stevens (and therefore comprising a majority) she found that general discrimination in the construction industry did not provide a compelling government reason for an explicit racial classification. O'Connor listed the five findings of fact that the District Court had found to justify remedial action:[197]

> (1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city's population; (4) there were very few minority contractors in local and state contractors'

> associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally.

She then refuted each of them, at length, showing that they were insufficient to support an explicit racial classification. Instead, O'Connor appeared to demand evidence of something "approaching a prima facie case of a constitutional or statutory violation" by someone in the Richmond construction industry.[198] Note that this list is not much less than Congress had in Fullilove when it justified the 10% set aside. So, for at least Stevens and Kennedy, and perhaps also for O'Connor, Rehnquist and White, there is a strong hint of a new willingness to examine legislative fact finding. Will this slop over to justifying minority preferences in broadcasting on the diversity rationale? Perhaps.[199]

O'Connor's majority said the failure to find a compelling state interest made the evaluation of whether the plan was narrowly tailored virtually impossible. The 30% set aside was related to nothing except "racial balancing", an impermissible goal.

Justice Stevens, concurring, reaffirmed the philosophy of his own opinions in Wygant and Fullilove, that legislative units ought to be allowed to justify using explicit racial classifications by relying on forward-looking rationales, rather than just remedial ones. But in this case, unlike Wygant, said Stevens, no such rationale exists.[200]

Kennedy, concurring in part, was openly skeptical of the argument about Section 5 of the 14th Amendment giving Congress greater power to use racial classifications than the states have. He also expressed support for Scalia's argument, contrary to Stevens', that race may never be used for anything other than a remedy.

Scalia, concurring, decried the use of race for nonremedial purposes, and almost entirely embraced O'Connor's theory of section 5 of the 14th Amendment to distinguish Fullilove.[201]

Justice Marshall, dissenting with Brennan and Blackmun, pointed out (correctly, in my opinion) that the evidence of discrimination that O'Connor rejected was precisely the same sort of evidence that had previously been accepted.[202] The evidence of statistical disparity between the percentage of business going to minority contractors and the percentage of minority population, coupled with testimony showing disciriminatory practices in the construction industry, should have been enough to show discrimination in this market, not just in society at large. Marshall then applied the familiar intermediate scrutiny test and found that eradicating the discrimination, both in remedial and prospective terms, justified the set aside program. The set aside was reasonably related to the goal of eradicating discrimination, and, like the program approved in Fullilove, contained an administrative waiver provision for exemptions, placed a minimal burden on white contractors (who could still compete for the

other 97% of business in the Richmond area), and affected no vested rights. Race-neutral contracting, required by law since 1975, has been totally ineffective, argued Marshall, and low-interest loans to small businesses have also proven useless.[203] Last, Marshall lamented the majority's chilly attitude toward affirmative action. In particular, the suggested requirement of finding a statutory or constitutional violation to justify remedial programs, the hint that only victims of specifically identified instances of discrimination may benefit,[204] and the theory that section 5 of the Fourteenth Amendment acts as a restraint on state power to remedy discrimination all represented an abandonment of prior learning and values.

B. PULLING THE CASES TOGETHER

Despite all of the discord in the many opinions in these four cases, we can discern some common themes. Virtually all of the opinions, except perhaps Chief Justice Burger's opinion in Fullilove, start by searching for good reasons that could justify the use of explicit racial quotas. Once a theoretically sufficient reason has been located, the justices check to see whether the specific program directly implements the reason, and does so at a low enough cost. The major differences in applying the general approach begin to surface in the two competing verbal formulations: "strict scrutiny" requires all explicit racial classifications to further a "compelling state interest" in a "narrowly tailored" manner. "intermediate scrutiny" requires affirmative action programs to serve "important governmental objectives" in a manner "substantially related" to those objectives.

1. What "Counts" as a Good Reason for Affirmative Action Programs?

a. Remedying Societal Discrimination

The broadest argument for affirmative action programs is that racial discrimination in society at large handicaps minority group members' attempts to involve themselves in all aspects of life. To remedy this unfair handicap, the government may use explicit racial classifications wherever a substantial disparity exists between the percentage of minorities in the population and the percentage of minorities in particular businesses, educational institutions, and so forth. This argument got only four votes in Bakke,[205] and has not done as well since that time. The opinions in Wygant and Croson now strongly suggest that only three justices -- Brennan, Marshall and Blackmun -- accept this rationale as applied to state and local governments. In fact, the Wygant and Croson opinions rejecting those programs were so strident that I suspect that almost no reason will justify affirmative action at the state and local level. The arguments of O'Connor, Rehnquist, White and Scalia in Croson that under section 5 of the 14th Amendment the federal government has greater powers than the

states to remedy racial discrimination, however, may give some breathing room for this rationale in federal programs.

b. Remedying effects of discrimination by nongovernmental actors in the industry.

Remedying discrimination in the industry against minorities and women by banks, insurance companies, suppliers, and so forth, may provide a more solid reason for affirmative action programs. This rationale helped validate the program tested in Fullilove, and Justice O'Connor's opinion in Croson suggested that where the private discrimination had become so pervasive that governmental action would necesarilly participate in the discriminatory activities, remediation would support the constitutionality of affirmative action programs.[206]

c. Remedying Past Discrimination by a Governmental Unit

All justices agree[207] that a governmental unit that has discriminated in the past may adopt race-conscious remedies to undo past harms. This is most obvious in the school desegregation cases, where school boards have been allowed (and even required) to assign students by race to undo the effects of past discrimination by the school board. But Fullilove also has strains of this rationale in it.[208]

d. Benefits From an Integrated Student Body

Only Justice Powell in Bakke has ever directly opined that the benefits from having an integrated student body could justify use of race as an explicit criterion in a multicriteria choice process. However, there are hints from two other justices that something like Powell's rationale might suffice. Justice O'Connor's footnote in Wygant suggested that promoting racial diversity on a faculty might justify affirmative action. Justice Stevens, also in Wygant, suggested that an integrated student body could be better served by an integrated faculty.

e. Role Models

In Wygant the majority rejected the role model theory -- that Black students needed to see and be taught by successful, smart, hard working Black teachers to know and understand that success was possible for them, too.

f. Increasing Medical Service to Minority Groups

U.C. Davis attempted to justify its admissions process on the ground that doctors who are members of minority groups will tend to give medical service to those minority groups. Although Powell seemed to accept this argument at the most theoretical level, he rejected it

as applied to U.C. Davis because the empirical relationship was unproven, and especially because U.C. Davis might able to pursue this goal without using explicit racial classifications.[209]

2. What is a Sufficiently Direct Connection Between a Racial Classification and the Reason for Using It?

I will not discuss in any detail the question of the direct connection between racial classifications and the justifications therefor. This issues are highly fact-dependent and contextual, and are better discussed within the framework of evaluating minority preferences in broadcasting. In a nutshell, the court focuses on the efficacy of a particular program at achieving its goals, the costs in terms of both money and other goals (herein of alternatives less intrusive), and fairness to third parties.

3. Application to Minority Preferences in Broadcasting

There seem to be three candidates for justifying minority preferences in broadcasting under the equal protection component of the due process clause of the 5th Amendment. I will organize the discussion by justification -- remedying societal discrimination, remedying past discrimination by the FCC, and increasing programming service to minority groups.

a. Remedying Societal Discrimination

The government might argue that the minority preferences in broadcasting are constitutional because members of minority groups are discriminated against throughout society, in education, business and industry, and as a result suffer an unfair handicap in the race to own businesses.[210] To show how this argument applies to broadcasting, the government would present data highly analogous to that produced in Fullilove.[211] Statistics would show that minority group members own a much smaller percentage of broadcasting outlets than their percentages in the population, at large, would suggest. As I suggested above, a majority of the Supreme Court rejects this argument as a justification for affirmative action. But, as applied more specifically to the broadcasting industry, it might work.

b. Remedying Discrimination in the Broadcasting Industry

Congress could claim that discrimination by financiers, insurance companies, studios, independant producers, advertizing agencies, and others has reduced the rate of economic survival by minorities in the broadcasting industry. Data on the differential rate statistics could be paired with testimony on the history of discrimination in the broadcasting and

entertainment business, as well as in allied industries. As a result, the government would claim, a direct remedy of minority preferences would be needed.

As I explained in the introduction to this article[212], there are two big problems with applying this argument to the cases before the Supreme Court. First, the FCC has never claimed that this is the rationale for the minority preference policies. Second, even if the FCC were allowed to change its tune and try to use this remedial justification, neither Congress nor the Commission has ever assembled the factual record to support the argument.[213] In fact, at Hearings before the Telecommunications Subcommitte of the Senate Committee on Commerce, Science, and Transportation, witnesses suggested developing such a factual record, and offered to help do so.[214]

Judge Edwards and Judge Silberman have appraised the remedial justification for minority preference policies in very different fashions. In Winter Park Communications v. FCC[215], Judge Edwards upheld the comparative hearing preference on this ground, referring to nothing much more than a statement in a conference report that "the effects of past inequities stemming from racial and ethnic discrimination . . ." continue to plague the broadcasting industry.[216] In contrast, Judge Silberman, concurring in Shurberg Broadcasting of Hartford v. FCC[217], found the findings constitutionally deficient to support the distress sale policy. In particular, Judge Silberman demanded some "particularized evidence of the effects of societal discrimination in [broadcasting]"[218]. Judge Silberman cited Croson many times in his discussion of the evidentiary burden that must be shouldered by the legislature, and seemed willing to scrutinize the evidence before Congress and the FCC in some detail. Because the FCC has not attempted to justify the minority preference policies on this basis, it is unsurprising that the evidence will stand up to no searching evaluation.

Because the FCC has not justified its minority preference policies on this remedial rationale, and because the relationship between ownership characteristics and programming choices plays no role in the rationale, I will pursue none of the subsidiary questions, such as the costs of each preference policy, the existence of alternatives, and fairness to third parties. But if the FCC were to adopt this rationale, these issues would be crucial.

c. Remedying Past FCC Discrimination Against Minorities

Everyone agrees that if a governmental unit has discriminated against minorities, it may lawfully use explicit racial guidelines to remedy that discrimination.[219] However, the FCC has never claimed to have discriminated in the past, and it is not clear how they would go about proving such a thing if they were to try to do so.[220] If the FCC were subjected to nothing

much more searching than the Fullilove standard, it might carry its burden. Broadcast historians could probably be found to testify that during the 1950s the FCC was staffed by right wing, racist Eisenhower appointees who would not even give licenses to rich, white Democrats.[221] These Commissioners, the historians would claim, would not have given the time of day, much less a valuable broadcast license, to a minority applicant.[222] During this time the vast majority of valuable television licenses were handed out.

On the other hand, if the FCC were to be subjected to something more analogous to the Croson approach, proving past discrimination would be difficult. First, I suspect that very few minorities applied for licenses during the 1950s,[223] and I know of know evidence to suggest the contrary. (This is a rational response to discrimination. Applying for a license is quite costly, and if the probability of getting the license is zero it is irrational to apply.) However, in Croson O'Connor indicates that, at a minimum, the government must compare the rate at which minorities applied for rights to the rate at which they were awarded to show discrimination. O'Connor's test would suggest that opponents of the minority preferences would be allowed to "explain" the lack of minority licensees by the lack of minority applicants, rather than by any governmental discrimination. Second, the multicriteria choice process used to award broadcast licenses muddies the water a great deal. Any decision to refuse to grant a license to a minority can be explained by other criteria in the decision.

Assuming that past discrimination by the FCC was proved, the question would be whether the minority preference policies were sufficiently connected to the goal of remedying the discrimination.[224] One possibility, suggested in Croson, is that only identified victims of discrimination can benefit from a remedial policy. If this rule were to be extended to the minority preferences, then only disappointed applicants would be eligible. Because it would be difficult to prove discrimination in any particular case, and because probably many of the disappointed applicants from the 1950s have died by now, the scope of the minority preference policies would be drastically narrowed.

d. Increasing Diversity in Broadcasting

The FCC has tried to justify the minority preferences in broadcasting as a means of increasing the diversity of broadcast programming. Although the D.C. Circuit has ruled that this goal is a compelling state interest[225], the Supreme Court has never faced the issue.

i. Diversity in Broadcasting as a Compelling State Interest

The Supreme Court--or at least some members of the Court--has passed on three suggested compelling state interests that might be analogous: diversity in student bodies;

producing more medical service to minority communities; and producing role models for minority students.[226] In the two D.C. Circuit cases that were issued this year, virtually all of the argumentation centered on the analogy between diversity in student bodies and diversity on the airwaves. Perhaps Judge Wald advanced the strongest arguments in favor of the analogy. She noted that the more general goal of advancing education by exposing students to many viewpoints is furthered by diversity in student bodies. Second, she stated that a great deal of learning takes place by watching and listening to broadcasts. Increasing diversity in broadcast offerings would therefore serve the same goal, and in the same way, as increasing diversity in student bodies.[227] The best response to this starts by reformulating the more general purpose served by diversity in student bodies. Justice Powell emphasized that a diverse student body would teach students not to be racially prejudiced and instead to judge individuals on their merits. The minority preferences in broadcasting would not serve this goal, for listeners and viewers have no idea about the race of a station's owner.[228]

The other two rationales--medical service to minorities and role models for minority students--can produce their own arguments about analogy. I will neither try to resolve any of these arguments nor even to outline the arguments. Rather, I will assume that diversity in broadcasting is a compelling state interest, and then ask what else must be shown to uphold minority preferences in broadcasting.

ii. The Nexus Between Ownership Characteristics and Programming

At a minimum, the government must demonstrate a nexus between ownership characteristics and programming. In the absence of such a connection, increasing the number of minority licensees would be irrelevant to achieving the goal of diversity in programming. The government's ability to "prove" such a nexus to the court will depend upon the strictness with which the court will examine supporting evidence.

The most relaxed standard grows out of Fullilove, where Chief Justice Burger allowed Congress to find, on a rather thin record, that low levels of federal contracting with minority contractors stemmed from past discrimination in the construction industry.[229] Justice Powell, concurring, wrote that "[a]lthough the [illegal] discriminatory activities were not identified with the exactitude expected in judicial or administrative adjudication,"[230] the discrimination was found with enough certainty to support a Congressional statute.[231]

Judge Wald, utilizing a Fullilove-like approach, has provided an extensive list of the "evidence" showing the nexus. She lists 1) The Kerner Commission's finding in 1968 that nonminority ownership of the media produced a white man's view of the world in the media, leading to frustration and violence on the part of minorities[232]; 2) The 1977 finding by the

United States Commission on Civil Rights that "a mass medium dominated by whites will ultimately fail in its attempts to communicate with an audience that includes Blacks"[233]; 3) several decisions of the D.C. Circuit that were "premised on the reasonable belief that encouraging minority ownership can be expected to promote diversity of programming"[234]; 4) the statement in the Conference Report accompanying the 1982 lottery amendments that "the nexus . . . has been repeatedly recognized"[235]; 5) the 1987 and 1988 appropriations riders directing the FCC to terminate any reexamination of the minority preference policies[236]; 6) statements by the Senate Commerce Committee accompanying the appropriations rider that "Diversity of ownership results in diversity of programming"[237]; and 7) the CRS study.

Under a Fullilove type of approach, Wald's evidence should support the nexus. Note that most social scientists would not regard the first six items as "evidence" of any sort. The best way for a social scientist to understand these six things is as sources of normative direction to a court, informing it where to place the burden of proof, and how heavy that burden should be. In essence Wald is arguing (quite correctly in my opinion) that under a Fullilove approach the first six sources place a heavy burden on those who would disprove the nexus. Given such a burden, this article's analysis of the CRS study plays a crucial role.[238] I have shown that although the CRS data might by worthless, they also might provide some support to both the consumption and the production cost advantage theories of why increasing minority ownership increases minority programming. This ambiguous support for the nexus should be enough to sustain the nexus, given the Fullilove type of scrutiny.

The Croson opinion suggests taking a far more skeptical approach when appraising factual assertions connected to explicit racial classifications. Another way of stating this is that the first six sources of normative direction listed by Wald would be far less important under the Croson ethic. Judge Williams took such an approach and, not surprisingly, found the evidence of a nexus wanting. The first six sources of evidence were either ignored or discounted because they represented mere "assertions" of a nexus, without any facts to back up the assertions. The CRS study came in for especially harsh treatment because of the study's failure to control for market demand, its lack of an objectively verifiable definition of minority programming, and its self-report technique.[239] Under such a skeptical approach, the Court will fail to find the nexus and rule the minority preferences unconstitutional.

As I noted above,[240] the choice between approach may depend in part on whether the Court chooses to read Croson as applying only to state and local governments. What would happen if the Court were take an intermediate, third path, when testing the nexus? I believe that Congress could pass some reformulated minority preferences, more closely tied to the theory presented in this paper, and survive the Court's test. The reformulated minority

preferences would have to provide an opportunity for a hearing at which the issue would be: "what is the liklihood that the exercise of a minority preference in this particular case will increase diversity in programming?" The parties would be allowed to present evidence on the factors that our theory suggested were most important: (1) Is there a substantial minority population in this market? (2) Is the minority population currently unserved? (3) How many outlets are there in the market? (4) What is the cost of minority programming, vs. nonminority programming? and so forth. In this way, the new policy would be keyed directly to the theory of the market, and would need less in the way of factual support to sustain it. Under a level a scrutiny that is intermediate between Fullilove and Croson, these reformulated minority preferences might survive.[241]

If I am correct, then of the four existing minority preference policies, the comparative hearing stands the best chance of surviving the constitutional test, for it provides the most opportunity for individual argument about application of the policy in each case. The distress sale, tax certificate, and lottery preference are far more mechanical and hence far more vulnerable to attack.

e. Narrow Tailoring

Several issues routinely get discussed under the rubric of "narrow tailoring." I will separate the discussion of each.

i. Individual Application

Racially explicit classifications must be applied to individual cases in ways that maximize the justification for the racial classification. One of the main arguments Justice O'Connor used to distinguish between Fullilove and Croson rested on the degree of matching between the goals of a set aside and the individual contractor's experience of discrimination. In Fullilove, only the costs directly attributable to past discrimination needed to be included in a general contractor's bid, and a hearing was available on the issue. In Croson, the O'Connor characterized Richmond's set aside plan as far less flexible, with no avenue for relief when a minority subcontractor's extra costs were neither reasonable nor due to past discrimination.

The minority preference policies would have to pass an analogous hurdle. The government would have to show that the minority preference polices were applied in individual cases so as to maximize the increase in diversity of programming. The reformulated minority preference policies that I described in the section immediately above would be most likely to pass muster. The hearing on the liklihood of increasing diversity in the individual case would speak directly to Justice O'Connor's concerns in Croson.

ii. Nonracial Alternatives

The government must show that it tried (or at least considered) and subsequently rejected nonracial alternative methods to increase diversity in programming. However, the FCC would face legal barriers to tackling the diversity in programming problem head on. First, section 326 of the Federal Communications Act prevents censorship by the FCC. Second, the First Amendment does much the same thing. There would be no barrier to using structural tools to increase diversity in programming. Increasing the number of outlets is the most obvious alternative that is suggested by the economic analysis in this paper. The FCC has already found, in the context of evaluating the fairness doctrine, that increasing the number of outlets increases diversity.[242]

iii. Burden on Third Parties

Policies using explicit racial classifications must not place unduly heavy burdens on innocent nonminorities.[243] This general rule produced the arguments in Wygant about whether or not layoffs placed a much heavier burden on innocent third parties than did hiring policies.[244] Fullilove's set aside policies were cited as examples of policies that spread relatively light burdens over large numbers of third parties.[245]

In Shurberg Judge Wald and Judge Silberman clashed over this issue. Judge Wald claimed that the distress sale policy spread its burdens over all nonminority applicants for broadcasting stations in the United States. One whose bid for a station was thwarted by the distress sale policy could apply for another station, somewhere else. Because the distress sale policy is rarely applied, there are many stations left available.[246] Judge Silberman's opinion regarded each broadcast market as unique. A disappointed claimant for a license in one market cannot fairly be told, according to Silberman, to take a license elsewhere. Therefore, the burden is great, and falls directly on the handful of applicants for a license.[247]

Another aspect of whether the burden on third parties is fair is whether the government considers other factors -- other than race, that is -- in making its decision. The multicriteria choice process approved by Powell in Bakke had this feature; race was only one of many criteria to be taken into account. The minority preference in the comparative hearing process was upheld in Winter Park in part on this ground. The other distress sale policies, however, do not have this feature, and will probably face rougher treatment because of it. If Congress were to reformulate the minority preferences so as to allow a hearing that encompassed all elements of the public interest determination when deciding whether to apply the minority preference in a particular case, the preferences would be more likely to survive.[248]

IV. OVERVIEW AND CONCLUSIONS

We have seen that the FCC has attempted to justify its minority preference policies by claiming that increasing minority ownership of broadcasting outlets will increase the volume of broadcasts targeted at minority groups. After reviewing the economic theory of broadcasting and the data on the connection between ownership characteristics and broadcast content, we saw that there could be a connection. This connection might exist either because minority group owners might indulge a taste for minority programming (a type of consumption behavior), or because minority owners have a production cost advantage in broadcasting to minority group members. The production cost advantage explanation is most likely for non-English language broadcasts (usually Spanish), next most likely for African American material, and least likely for female-oriented programming. In addition, the explanation gains credibility for minority owned stations in markets where there is a large minority population, many competing outlets, and no competitive providers of minority programming. In sum, a social scientist could conclude that there is some connection between minority ownership and minority programming in certain types of markets.

Next, we reviewed the cases about the Constitutionality of racial preferences, and found that under the most recent cases the Supreme Court has concentrated on remedial justifications for racial preferences. The remedial goal, however, probably cannot be proved sufficiently under the Supreme Court's approach. The FCC has emphasized, instead, the diversity in broadcasting goal to justify the minority preference policies. Depending upon how one reads Croson, the diversity in broadcasting goal may not even be a valid justification for affirmative action policies. And even if diversity is a valid justification, the existing proof of the connection between ownership characteristics and broadcasting content will not allow a skeptical social scientist to conclude that minority ownership increases diversity of content, and may also fail to persuade the Supreme Court to uphold the minority preference policies.

TABLE 1

Program Types

	L_1	L_2	L_3	L_4
NUMBER OF VIEWERS	210	75	50	31

TABLE 2

Programs Offered by Competitors

Number of Channels	1	L_1	-	-	-
	2	L_1	L_1	-	-
	3	L_1	L_1	L_2	-
	4	L_1	L_1	L_1	L_2

TABLE 3

Programs Offered by Monopolist

Number of Channels	1	L_1	-	-	-
	2	L_1	L_2	-	-
	3	L_1	L_2	L_3	-
	4	L_1	L_2	L_3	L_4

TABLE 4

Group size under alternative distributions

		A. Highly Skewed Dist	B. Skewed Distribution	C. Nearly Rect Distribution
g	1	8,000	5,000	1,077
r	2	1,600	2,500	970
o	3	320	1,250	872
u	4	64	625	785
p	5	12	313	707

Ordinal ranking of program types by viewer groups

1. viewers watch only first choice

	viewer group number				
	1	2	3	4	5
programs 1	1				
2		1			
3			1		
4				1	
5					1

2. viewers have unique lesser choice

	viewer group number				
	1	2	3	4	5
programs 1	1	1	2		
2		1	2		
3			1	2	
4				1	2
5					1

3. viewers have a common lesser choice (common denominator)

	viewer group number				
	1	2	3	4	5
programs 1	1	2	3	3	3
2		1	2		
3			1	2	
4				1	2
5					1

TABLE 5

Case number	Pref pattern	viewer distrib	No. of channels	Programs offered	
				Monopoly	Competition
1	1	A	3	1,2	1,1,1
2	1	A	6	1,2	1,1,1,1,1,2
3	1	C	3	1,2,3	1,2,3
4	2	B	3	1,3	1,1,2
5	2	C	3	1,3,5	1-4, each with 75% probability*
6	3	C	5	1	1,2,3,4,5**

TABLE 6

Group size under alternative distributions

		A. Highly Skewed Dist	B. Skewed Distribution	C. Nearly Rect Distribution
g	1	8,000	5,000	1,077
r	2	1,600	2,500	970
o	3	320	1,250	872
u	4	64	625	785
p	5	12	313	707

Ordinal ranking of program types by viewer groups

1. viewers watch only first choice

viewer group number
1 2 3 4 5

programs					
1	1				
2		1			
3			1		
4				1	
5					1

2. viewers have unique lesser choice

viewer group number
1 2 3 4 5

programs					
1	1	2			
2		1	2		
3			1	2	
4				1	2
5					1

3. viewers have a common lesser choice (common denominator)

viewer group number
1 2 3 4 5

programs					
1	1	2	2	2	2
2		1			
3			1		
4				1	
5					1

TABLE 7

Percentage of total audience that must be given up by M to show type 5 programming

		viewer preference pattern		
		1	2	3
viewer group dist	A	26.5	31.9	33.2
	B	22.6	26.9	30.1
	C	6.0	5.0	17.3

TABLE 8

Percentage of total audience that must be given up by M2 to show type 5 programming if M is already showing type 5

		viewer preference pattern		
		1	2	3
viewer group dist	A	40.0	48.0	49.9
	B	31.1	43.5	46.8
	C	15.2	14.0	34.0

TABLE 12

Percent of Men and Women Owners
Broadcasting Minority and Women's Programming

	Men	Women
Target Groups for Programming:		
Women	28	35
Black	19	25
Hispanic	10	10
Asian/Pac	3	3
Ind/Alaska	4	5

ENDNOTES

* I received valuable help from Antoinette Cook, Wilhelmina Cooke, Erwin Chemerinsky, Richard Craswell, Gary W. Cox, David Haddock, Thomas Hazlett, Margaret Radin, Florence Setzer, Pablo Spiller, and all of the participants at workshops on this paper at the University of Chicago Law and Economics Workshop, The Hoover Institute, The University of Illinois Department of Economics, Yale University School of Organization and Management, and the 1989 Telecommunications Policy Research Conference.

1. TV9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert. den. 419 U.S. 986 (1974); and West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir 1984).

2. Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 902 (D.C. Cir 1989) [1989 U.S. App. LEXIS 8887.] cert. granted 110 S.Ct. 715 (1990).

3. Winter Park Communications Inc. v. FCC, 873 F.2d 347 (D.C. Cir. 1989), cert. granted 110 S.Ct. 715 (1990).

4. Cert granted 110 S.Ct. 715 (1990).

5. This is part of a somewhat broader question about the relationship between owners' characteristics and programming. E.g. Gary Hale and Richard C. Vincent, Locally Produced Programming on Independent Television Stations, 63 J. Quart. 562 (1986); Harvey A. Levin, Fact and Fancy in Television Regulation (1980); and Timothy E. Wirth, Assured Diversity is Needed, pg. 4, col.5, L.A. Daily Journal, August 29, 1984(discussing multiple ownership rules).

6. U.S. Const., Am I.

7. 47 U.S.C. sec. 326. It is true that the FCC has, at many times in its history, imposed many content-based requirements on broadcasters, particularly in the area of nonentertainment programming. See Program Policy Statement (Network Programming Inquiry), 25 Fed. Reg. 7291 (1960)(requiring programming in 14 different categories, including programs for children, religious programs, educational programs, public affairs, editorials, politics, agriculture, news, weather, sports, minority programming, local self-expression, programs with local talent, and entertainment). Breaking down minority programming into the very narrow, specific categories needed to implement the minority preference policies directly, however, would be going "too far".

There is also a secondary question. If the FCC may not constitutionally require minority programming directly, may the Commission justify the minority preference policies as an attempt to foster that diversity indirectly? Although the reader's instinctive response may be "no", there are examples involving governmental involvement in communications in which the answer may be "yes." For example, the government may set up a free speech area so as to foster a robust political debate, hoping that proponents of many different views will speak, but under the first amendment no one speaker may be required to offer any particular view. Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983); Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788 (1985).

8. In addition, recent cases suggest that the court will require the government to show a very convincing case of past discrimination. See text and notes at about note 184.

9. Previous works discussing the minority preference policies have failed to inquire about the actual relationship between ownership characteristics and programming. E.g. Steven Weissman, The FCC and Minorities: An Evaluation of FCC Policies Designed to Encourage Programming Responsive to Minority Needs, 16 Col. J.L. and Soc. Prob. 561 (1981); David Honig, The FCC and Its Fluctuating Commitment to Minority Owdnership of Broadcast Facilities, 27 Howard L.J. 859 (1984); and Kurt A. Wimmer, Deregulation and Market Failure in Minority Programming: The Socioeconomic Dimensions of Broadcast Reform, 8 Comm/Ent L.J. 329 (198x).

10. For the purposes of this article I presume that white males are profit-maximizers.

11. cite _____ U.S. _____ (1989).

12. 47 U.S.C. sec 307, 309

13. 47 U.S.C. sec 307(c).

14. This can happen both at the first award of a license, or at renewal time if one or more challengers contest the renewal. 47 U.S.C. sec. 309.

15. See Spitzer, Radio Formats by Administrative Choice, 47 U. Chi. L. Rev. 647 (1980); Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970); Central Fla. Enterprises v. FCC, 598 F.2d 37 (D.C. Cir. 1978), cert. dismissed 441 U.S. 957 (1979).

16. See 1965 Policy Statement, 1 FCC2d 393 (1965).

17. Pick up any copy of Broadcasting Magazine and leaf through the classified ads at the back to view the numerous ads by brokers.

18. 47 USC sec 310(d).

19. West Michigan Broadcasting Co. v. F.C.C., 735 F.2d 601 (D.C. Cir. 1984).

20. See Central Fla. Enterprises v. FCC, 598 F.2d 37 (D.C. Cir. 1978), cert. dismissed 441 U.S. 957 (1979).

21. TV9, supra note xx.

22. TV9, supra note xx, at yyy.

23. Mid-Florida Television Corp., 69 FCC 2d 607, 652 (1978),

24. Id. at yy.

25. Id. at yy.

26. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 981 (1978).

27. Id. at 983.

28. FCC press release, in my files

29. Dennis McDougal, There's a New Geraldo, Sort Of, Calendar, Pg. 3, Los Angeles Times, March 5, 1989.

30. In re Petition for Issuance of policy Statement, 69 F.C.C.2d 1591, 1593 n.9 (1978).

31. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 983 (1978).

32. See FCC press release

33. Public Law Number 97-35, the Omnibus Budget Reconcilliation Act of 1981, Chapter 2 -- Television and Radio Broadcasting, 95 Stat. 736.

34. H.R. Rep. No. 97-208, 97th Cong., 1st Sess. (1981), at 897.

35. 47 U.S.C.A. sec. 309(i)(3)(A)(198x).
The conference report muddied the waters a bit. It stated "[i]t should be noted that such groups as women, labor unions, and community organizations which are mentioned in the legislative history of the lottery statute that was originally adopted . . . are all significantly underrepresented in the ownership of telecommunications facilities. Such applicant groups would, of course, be eligible for both media ownership and minority preferences if they meet the eligibility guidelines. The Conferees expect that such groups will also substantially benefit from this lotterey preference scheme. . . . " Section 115 of the Communications Amendments Act of 1982, Public Law No. 97-259.

36. Second Report and Order, 93 FCC2d 952 (1983).

37. Third Notice of Proposed Rule Making, 95 F.C.C.2d 432 (1983). The FCC asked if women can be included in lottery preference, as either minority group, or under group of those owning few media interests. In response, American Association of University Women, American Women in Radio and Television, National Organization for Women Legal Defense Fund, and others said "yes." American Christian Television Systems, Inc.; Citizens Communications Center [a Georgetown Univ. related public interest group]; Black Citizens

for a Fair Media; National Conference of Black Lawyers; and United Church of Christ all said "no".

38. In re Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries instead of Comparative Hearings, 58 RR 2d 1077 (8/16/85)(FCC reads new sec 309 as precluding women from being included as minorities for purpose of the lottery, and hence decided to give no preferences in lottery to women); affirmed Pappas v. FCC, 807 F.2d 1019 (D.C. Cir. 1986).

39. West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984).

40. Particularly in news and public affairs. Id. at 610.

41. Id. at 610-11.

42. 448 U.S. 448 (1980).

43. 438 U.S. 265 (1978).

44. 770 F.2d 1192 (1985).

45. Id. 1198.

46. Id. at 1199.

47. See Leiby, The Female Merit Policy in Steele v. FCC; "A Whim Leading to a Better World?", 37 Am. U.L. Rev. 379, n.4 (1988) for this history.

48. See In re Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications, 1 FCC Rcd 1315 (12/30/86) and Notice of Inquiry, 52 Fed.Reg. 596 (1987).

49. House Joint Resolution 395, 12/22/1987, contains a rider that states:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificants . . . to expand minority and women ownership of broadcasting licenses.

50. See 3 FCC Rcd 866 (2/9/1988).

51. Shurberg, supra note xx, at yy; and Winter Park, supra note xx, at zz.

52. Cert. granted 110 S.Ct. 715 (1990).

53. Peter O. Steiner, Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting, 66 Q.J. Econ. 194 (1952).

54. Actually, Steiner's work derives from Hotelling, Stability in competition, 39 Economic Journal 41 (1929). For an excellent review of this literature, see B. Curtis Eaton and Richard G. Lipsey, Product Differentiation, in Handbook of Industrial Organization, Vol. 1, pg. 723 (1989).

55. Michael Spence and Bruce Owen, Television Programming, Monopolistic Competition, and Welfare, 91 Q.J. Econ. 103 (1977).

56. Steiner, supra note xx, at 195.

57. Jerome Rothenberg, Consumer Sovereignty and the Economics of TV Programming, 4 Studies in Public Communication 45 (1962).

58. P. Wiles, Pilkington and the Theory of Value, 73 Econ. J. 183 (1963).

59. Jack H. Beebe, Institutional Structure and Program Choices in Television Markets, 91 Q.J. Econ. 15 (1977).

60. Bebee, supra note xx, at 21.

61. Bebee, supra note xx, at 22.

62. This is taken from Table II in Bebee, supra note xx, at 24.

63. This result was first noted by Wiles, supra note xx, at 187.

64. Bebee, supra note xx, at 30.

65. This depends on the elasticity of demand for ad time. The marginal cost of producing ad time is virtually zero.

66. Michael Spence and Bruce Owen, Television Programming, Monopolistic Competition, and Welfare, 91 Q.J. Econ. 103 (1977).

The economic literature on product differentiation can be divided into two branches. See B. Curtis Eaton and Richard G. Lipsey, Product Differentiation, in Handbook of Industrial Organization, pg. 723, (1989). In the "address" branch, researchers assume that consumers have ideal points within a space of characteristics of a product. Products are identified by their location in the space of characteristics. For an example of empirical work on television shows, attempting to locate them within a 48 dimensional characteristic space, see Gary Bowman, Consumer Choice and Television, 7 Applied Economics 175 (1975). In the "non-address" branch, the researcher assumes a finite number of goods, and

characterizes them by the degree to which the goods are regarded as substitutes for one another. To get results, researchers frequently employ a symmetry assumption, according to which all goods are equally good substitutes for one another. Spence and Owen work in the "non-address" tradition.

67. Although this measure is traditional in economic studies of markets, it is not without a great of controversy in philosophy and law. See Symposium on Efficiency as a Legal Concern, 8 Hofstra L. Rev. 485-770 (1980).

68. In the Spence and Owen model, each firm chooses output under the assumption that other firms' decisions will not react to its own choice.

69. The mathematics and exposition are rendered much clearer by Robert Lence, Theories of Television Program Selection: A Discussion of the Spence-Owen Model, Discussion Paper No. 94, Studies in Industry Economics, Department of Econ., Stanford Univ. (1978).

70. Lence, supra note xx, at 30.

71. Spence and Owen, supra note xx, at yy. Much of the rest of their analysis consists of characterizing industry equilibria if all programs are equally good substitutes, and then ranking the welfare properties of these equilibria. Because very little light is shed upon the question of minority programming, and because of the somewhat controversial notion of total surplus as applied to minority programming, we will not review the remainder of Spence and Owen's work in text.

72. See Steven S. Wildman and Bruce M. Owen, Program Competition, Diversity and Multichannel Bundling in the New Video Industry in VIDEO MEDIA COMPETITION: REGULATION, ECONOMICS, AND TECHNOLOGY (Eli Noam Ed. 1985), in which the authors analyze a video market in which each monopolistic competitor can choose between advertiser support or direct viewer payments. If each viewer is restricted to purchasing at most one channel, Wilman and Owen's results track those of Spence and Owen. If viewers are allowed to purchase more than one service, however, the theoretical models become intractable.

Wildman and Owen also explore multichannel bundling, such as is done with "tiering" on most cable television systems, and demonstrate than it may, depending on demand and cost parameters, either enhance or inhibit economic efficiency.

73. Waterman, "Narrowcasting" on Cable Television: A Program Choice Model, Annenberg Schl of Commun., Univ. So. Cal. (Oct. 12, 1988).

74. Severin Borenstein, On the Efficiency of Competitive Markets for Operating Licenses, 103 Q.J. Econ. 357 (1988), shows that an auction mechanism will not necessarilly allocate licenses -- including broadcasting licenses -- to the most welfare-enhancing use. The "lumpiness" of licenses causes bidders to consider the profit on inframarginal units, thereby leading to economically inefficient choice of broadcast format. The bias will be against minority-interest programming, and for mass appeal programming.

75. Eli M. Noam, A Public and Private-Choice Model of Broadcasting, 55 Pub. Choice 163 (1987).

76. Noam claims "the use of a distribution other than the normal would alter not so much the basic analysis as the computations." Noam, supra note xx, at 165. But, as Garber shows, changing the distribution would change the results Noam gets. Steven Garber, The Economics and Political Economy of Broadcasting: Challenges in Developing an Analytic Foundation, 55 Pub. Choice 189 (1987).

77. Noam, supra note xx, at 169.

78. Noam, supra note xx, at 175.

79. Garber, supra note xx, provides a compelling criticism of Noam's approach and techniques. Whether or not Garber is right (and I believe that he is), for our purposes the important point is that Noam's conclusions seem consistent with those of Bebee and Spence-Owen.

80. Gary W. Cox, Centripetal and Centrifugal Incentives in Electoral Systems, working paper from Department of Political Science, University of California, Sand Diego, La Jolla, CA 92093 (March 1989)(get permission to cite this paper). See also Gary W. Cox, Electoral Equilibrium under Alternative Voting Institutions, 31 American J. Poli. Sci 82, 89 (1987).

81. See Cox, Centripetal and Centrifugal, supra note xx, at Theorem 4.

82. If, that is, a Nash equilibrium exists.

83. Cox's results described in text apply to the case where each voter has only one vote, and the competitors are political parties under a proportional representation system. Two points should be made about the applicability of this model to the broadcast market. First, as Gary Cox pointed out to me in conversation, listeners may divide up their listening day among several stations, and hence could be though to have more than one vote -- perhaps one vote per half hour -- but may abstain from voting (turn off the set) or cumulate their votes (by listening to or watching the same station during several periods). If this is a more appropriate characterization of the broadcasting market, Cox's results are modified in the following way. Assume each voter has v votes. Then as long as there are more than 2v competing political parties, then any equilibrium will be dispersed in the sense that the furthest left party must be positioned at or to the left of the ideal position of the (v/m)th most conservative voter, and the furthest right party must be positioned at or to the right of the ideal position of the (m-v/m)th most conservative voter. Id. at Theorem 4.

Second, in a proportional representation system, a competing party must garner at least some threshold percentage of the votes to gain representation in the legislature. For example, in a legislature with 50 seats, at party would need at least 2% of the vote. In broadcasting, however, a station with only 1% of the listening public gets to "keep" its audience. Cox notes that "it can be shown that formulas with lower thresholds of exclusion will promote greater dispersion (at least in models allowing . . . global spatial mobility.)" Id. at 21.

84. Robert P. Rogers and John R. Woodbury, The Conflict Between Spectrum Efficiency and Economic Efficiency: Diversity Considerations in the Flexible Use of Spectrum Allocated to Radio, Federal Trade Commission, Working Paper, October 21, 1988.

85. Formats were easy listening, rock, big band, black, classical, ethnic (most of which are hispanic), religious, classical, news/talk, jazz, country, and other. Rogers and Woodbury, supra note xx, at 8.

86. David Waterman and August Grant, "Narrowcasting on Cable Television: An Empirical Assessment, Working Paper, Annenberg School of Communications, Univ. So. Cal., Feb. 17, 1989.

87. Arts & Entertainment Network, Black Entertainment Television, Christian Broadcasting Network, Cable News Network, C-SPAN, Discovery, ESPN, Eternal Word Television, Financial News Network, Headline News, Home Shopping Network, The Learning Channel, Lifetime, MTV, The Nashville Network, National Jewish Television, Nickelodeon, The Silent Network, Spanish International Network, Tempo, USA, VH-1, The Weather Channel, WGN, WOR, WTBS.

88. American Movie Classics, Bravo, Cinemax, Disney Channel, Galavision, Home Box Office, Home Theater Network, The Movie Channel, Nostalgia Channel, The Playboy Channel, Showtime.

89. CBS, NBC, and ABC.

90. E.g. children's, public affairs, etc.

91. E.g. first run.

92. E.g. informational, dramatic.

93. Waterman and Grant, supra note xx, table 2.

94. See Insight 4, at page xx.

95. In addition, the FCC's professed preference for "local ownership" may have concentrated African-American and Hispanic ownership in communities with large African-American and Hispanic audiences. As a result, African-American owners and Hispanic owners may, for purely profit-oriented reasons, program to minority audiences more than the average white owner does.

96. Obviously, I am discounting any false-consciousness, "identification with oppressor" argument that would cut in the opposite direction.

The consumption argument is related to, but distinct from, the recent claim that nonwhites and women speak with a different "voice." The claim about "voice" is, at core, an argument that minorities and women experience life in different ways

than do white men, and that these different experiences manifest themselves in a different set of perceptions and, perhaps, normative descriptions of reality. See, for example, Matsuda, Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground, 11 Harv. Women's L. J. 1 (1988)(giving examples of how minority status might make a difference); and Delgado, The Imperial Scholar: Reflections on a Review of Civil Rights Literature, 132 U. Pa. L. Rev. 561 (1984)(making the incendiary suggestion that liberal white law professors should stop writing about civil rights so as to make room for minorities). See also Bell, Strangers in Academic Paradise: Law Teachers of Color in Still White Schools, 20 U.S.F.L. Rev. 385 (1986); Bell, Bakke, Minority Admissions, and the Usual Price of Racial Remedies, 67 Cal. L. Rev. 3 (1979); and Bell, The Unspoken Limit on Affirmative Action, in And We are Not Saved, pg. 140, (1987). For a critical review of this literature, see Randall Kennedy, Racial Critiques of Legal Academia, 102 Harv. L. Rev. 1745 (1989). [note to editors: I have used Kennedy's first name b/c there are now so many Kennedys writing in the area]

97. To see how this works, assume that the three competitors are showing types 1, 2, and 3 to start with. If this is true, the broadcaster who is showing type 1 can improve his viewership by showing type 4, which gets 785+707 = 1,492, which is much better than the 1,077 he got for showing type 1. Once he makes the switch, the three broadcasters are showing 2, 3, and 4. But in this case the broadcaster showing type 2 can do better by showing type 1, for that allows her to get everyone in group one and in group two. Once she makes the switch, the three broadcasters are showing 1, 3, and 4. Etc.

98. Using the original assumptions about preference distribution from Bebee's article complicates the programming solution, but does not change average viewership levels. In case 3C, for example, the solution would be a cycle (1,2,3) -> (1,4,3) -> (1,4,2) -> (1,3,2).

99. I will not discuss examples with monopoly in them for two reasons. First, there is no reasonable liklihood that the U.S. broadcasting system will be reorganized as a monopoly. Second, if a monopoly were to gain control of U.S. broadcasting, I strongly suspect it would be run by upper class white males who would have no interest in presenting minority interest programming, except insofar as broadcasts of PGA tournaments count as minority programs.

However, I should point out that if a monopolist interested in presenting minority interest programming were to gain control, the monopolist could often satisfy his tastes at lower cost than a competitor could. For example, in case 3C, a monopolist could show type 5 programming at no cost to himself at all, whereas a competitor would have to give up a great deal.

100. An excellent review of the entire area is in Bengt R. Holmstrom and Jean Tirole, The Theory of the Firm, Handbook of Industrial Organization, Vol. 1, pg. 61, (1989). Classics in the field include Holmstrom, Moral Hazard and Observability, 10 Bell J. Econ 74 (1979); Ross, The Economic Theory of Agency, 63 Am. Econ. Rev. 134 (1973); and Simon, A Formal Theory of the Employment Relationship, 19 Econometrica 293 (1951). See also Tirole, Hierarchies and Bureaucracies, 2 J. L. Econ. & Organ. (1986).

101. Again, a skeptic might reply, the argument in text is irrelevant to justifying minority preferences in broadcasting. All a production cost advantage suggests is that white owners should sell stations to minority purchasers, who will be able to realize the increased profits from lower costs. Although the skeptic has a point, there are two replies that can be made. First, the minority preferences save on subsequent transaction costs. Second, there may be capital market imperfections that make it too costly for blacks to borrow money to purchase stations on the basis of asserted cost advantages. For an argument that capital market imperfections exist, see Report on Minority Ownership in Broadcasting, FCC, May 17, 1978, at 11-17; and Honig, The FCC and Its Fluctuating Commitment, supra note xx, at 875-76.

102. This is not to say that the minority owner would be able to monitor his managers costlessly. I am only arguing that minority owners from groups that speak languages other than English are likely to have significantly lower costs of monitoring managers' performance. To the extent that a white owner speaks, for example, Spanish and reads La Opinion, the white owner will suffer a much smaller comparative disadvantage.

103. For a review of literature confirming this, see Paule M. Poindexter and Carolyn A. Stroman, Blacks and Television: A Review of the Research Literature, 25 J. Bdcstg. 103, 110-13 (1981).

104. See Dillard, J.L., Lexicon of Black English (1977); Folb, Edith A., Runnin' Down Some Lines: The Language of Black Teenagers (1980); and Smitherman, Geneva, Talkin' and Testifyin': The Language of Black America (1977). See also Martin Luther King Junior Elementary School v. Ann Arbor School District Board, 473 F. Supp. 1371 (1979).

105. Lower-middle and lower class blacks must be the target audience because there are so few blacks in the middle and upper classes. In 1987, 7.5% of American Black households earned incomes of $50,000 or more, as compared to 19.7% of white households. Statistical Abstracts of the United States 1989, pg. 440.

106. Dennis Hunt, Black Radio Deabates the Inclusion of White Artists, Calendar, pg.5, Los Angeles Times, March 26, 1989. The article contains complaints by black radio programmers about the need to program white artists into the schedule, and lament the loss of genuine black radio formats. A skeptic might interpret these complaints as the managers' unhappiness with the slightly reduced value of their skills at programming for a specialized market. On the question of Black-oriented radio and its place in the market, see Paul Grein, Pop Eye: Motown on the Road to a Comeback, Calendar, pg. 70, Los Angeles Times, July 30, 1989; and Steve Hochman, Black Rock Coalition Pushes for an End to 'Musical Apartheid,' Calendar, part 6, pg. 1, col. 1, Los Angeles Times, June 14, 1989.

107. According to figures supplied by CBS, the ratings for the two shows were as follows:

CAGNEY & LACEY

Women 18+	Men 18+

TV SEASON	Rtg	Sh	Rtg	(000)	% Dist	Rtg	(000)	% Dist
1981-82	15.2	24	12.3	10,380	53.1	9.7	7,360	37.6
1982-83	15.2	24	11.3	9,780	52.0	9.0	6,980	37.1
1983-84	20.9	36	16.3	14,270	55.7	12.0	9,460	36.9
1984-85	16.9	28	13.6	12,050	58.0	8.8	6,990	33.6
1985-86	16.7	27	13.6	12,160	57.9	8.6	6,960	33.2
1986-87	15.1	24	12.1	11,010	59.8	7.4	5,488	32.9
1987-88	13.0	22	10.7	9,868	57.7	6.6	5,488	32.1

Source: NTI

KATE & ALLIE

			Women 18+			Men 18+		
TV SEASON	Rtg	Sh	Rtg	(000)	% Dist	Rtg	(000)	% Dist
1983-84	21.9	33	18.2	15,910	52.6	11.7	9,240	30.6
1983-85	18.3	27	14.9	13,220	52.4	9.3	7,400	29.3
1985-86	20.0	29	16.7	14,980	51.7	10.1	8,140	28.1
1986-87	18.3	27	15.9	14,480	53.4	8.9	7,290	26.9
1987-88	14.7	22	12.3	11,295	55.6	7.5	6,198	30.5
1988-89	13.1	20	10.8	10,113	56.8	6.8	5,715	32.1

Source: NTI

UNIVERSES

TV SEASON	HOUSEHOLDS	WOMEN 18+	MEN 18+
	(000)	(000)	(000)
1981-82	81,500	84,720	76,140
1982-83	83,300	86,350	77,770
1983-84	83,800	87,480	78,870
1984-85	84,900	88,570	79,850
1985-86	85,900	89,560	80,800
1986-87	87,400	90,830	81,980
1987-88	88,600	91,900	82,980
1988-89	90,400	93,410	84,470

Source: NTI

108. This does not preclude, of course, the possibility that many women might have a strong taste for broadcasting to other women.

109. See Program Policy Statement (Network Programming Inquiry), 25 Fed. Reg. 7291 (1960)(requiring programming in 14 different categories, including programs for children, religious programs, educational programs, public affairs, editorials, politics, agriculture, news, weather, sports, minority programming, local self-expression, programs with local talent, and entertainment).

110. See In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York, 2 F.C.C.Rcd. 5043 (1987).

111. Two of the witnesses at the Senate hearings in September of 1989 urged arguments something like this upon the Subcommittee on Telecommunications. See Testimony of John Payton at 29-30; Address of Mr. Percy E. Sutton at 2 - 5.

This should not be confused with the related argument that although women do not all think alike about controversial issues, women are much more likely than men to agree that some issues are important and deserve to be treated. See Lieby, The Female Merit Policy, supra note xx, at 406. This argument does suggest that women owners will program very different material than will men.

112. The analysis would likely depend upon the relative income levels of those in each of the groups. My guess is that the lower the relative income of a listener or viewer, the higher the tolerance for commercial announcements, and the more likely that group is to provide demand for over-the-air programming. Of course, the lower the income the less desirable is the group as a target audience. As applied to ethnic groups, my guess is that blacks, one of the poorest groups in the United States, would tend to substitute away from commercial broadcast far less than would Asians, one of the richest groups in the United States.

113. Lawrence Soley and George Hough III, Black Ownership of Commercial Radio Stations: An Economic Evaluation, 22 J. Bdcstg. 455 (1978).

114. There was only one black-owned television station in the U.S. Id. 458.

115. taken from id. at 459.

116. Id. 461.

117. Loy A. Singleton, FCC Minority Ownership Policy and Non-Entertainment Programming in Black-Oriented Radio Stations, 25 J. Bdcstg. 195 (1981).

118. Singleton's most egregious error was his decision to locate all black-oriented radio stations, determine the race of the owners, and then compare the actions of black and white owners who were broadcasting to blacks. This is wildly inappropriate when trying to evaluate a policy that first picks an owner by race and then hopes for differential programming output. To see this, just note that if black owners were far more likely than white owners to program for blacks, then even if black and white owners who chose to program for blacks were to provide equal levels of public service programming, awarding a license to a black instead of a white would, other things being equal, tend to provide more public service programming to the black community. In effect, Singleton got the causation element of the minority preference policies backwards.

Singleton should have located all black owners and then asked how much community service programming the black owners provide to the black community, as compared with whites. Even this data might, however, fail to have much value. The ability of Black owners to choose the locale of purchased stations might alter the analysis. After all, if Black owners were to choose to purchase stations in areas with large (relatively underserved) Black

populations, then maybe the market demand, and not Black owners' bountiful supply, would explain the tendency of Blacks to program for blacks. But this argument would only make a difference if Black owners were to purchase stations in areas with large black populations for reasons unrelated to the Black owners' lower costs of targeting a Black audience or special desire to serve a Black audience. For example, if Black owners were to purchase stations with an eye toward personally running the station and also being able to frequently socialize with many Black friends, the Black owners' choice might dictate location, and the location would dectate the target audience. In this way we might observer Black owners programming for Black audiences far more often than non-Black owners, but no cost advantage or desire to serve Black audiences would be present. On the other hand, if Black owners were to purchase stations in areas with large Black audiences so as to take advantage of lower costs or special desires to serve Black audiences, then the location would be the effect, rather than the cause. It would be hard to know, just from staring at the data, which scenario was correct.

119. Jorge Reina Schement and Loy A. Singleton, The Onus of Minority Ownership: FCC Policy and Spanish-Language Radio, 31 J. Communication 78 (1981).

120. Schement and Singleton use a research design similar to that used by Singleton, but avoid drawing inappropriate policy conclusions therefrom. Schement and Singleton suggest that it may be inappropriate to expect Latino owners who choose to program in Spanish to provide significantly more public service programming than do white owners who program in Spanish.

121. Study of this quite current data set is crucial for the case of black oriented radio because of the upheavals in the market since the late 1970s. During that period the disco craze took hold, and many white listeners were attracted to formerly all black audiences. When disco died, the Urban Contemporary format was created. U/C tends to attract a multi-ethnic audience, with roughly similar numbers of black and white listeners. As a result, the remaining audience for strictly black formats has been reduced. See Michael C. Keith, Radio Programming: Consultancy and Formatics 165-66 (1987).

122. The questionaire also asked about other things, such as degree of integration of ownership into management. The items listed in text are those of central importance to our inquiry, however.

123. The statement in text may be a bit too strong. There is a very strong argument that Joint Resolution 395 was unconstitutional. See J. Gregory Sidak, The Recommendation Clause, 77 Georgetown L.J. 2079 (1989). Perhaps I should say that the FCC chose to terminate the inquiry.

124. CRS study, pgs 2-3.

125. The large markets were New York, NY; Dallas, TX; Los Angeles, CA; Chicago, IL; Atlanta, GA. CRS study, page 3.

126. The five small markets were Flagstaff, AZ; Elmira, NY; Meridian, Miss.; Butte, Montana; and LaCrosse, Wisconsin. CRS study, page 3.

127. The CRS study cautions, at page 3, against leaning very hard on its conclusions precisely because they have no firm handle on separating these effects.

128. Derived from CRS study, page 9.

129. Derived from CRS study, page 14.

The opposite trend in broadcasting to other ethnic groups is observed for stations with less than 51% minority ownership.

TABLE 13

Percent of Station In (<51%) Ownership Groups
Broadcasting Black Programming

non-Black	Black	Hispanic	Asian/Pac	Ind/Alask	Women
20	60	46	28	39	26

Broadcasting stations with less than 51% black ownership are more likely to broadcast to other ethnic groups. This sort of data is not particularly helpful for several reasons. First, there is no breakdown according to how large a percentage these owners had, or the nature of the other owners. If many of the stations that had small percentage of black ownership also had less than 51% ownership interests by other ethnics, this could explain some of these results. Second, the economic models I presented were constructed to explain the programming choices of minorities who controlled the broadcasting stations -- in effect 51% or more owners. For these reasons, I will concentrate on the data from the stations that are owned by minorities and women.

130. See Broadcasting Television & Cable Factbook, A-13 (1987).

131. Soley and Hough, supra note xx.

132. I also have no a priori expectations as to whether white male owners would target white males.

133. The CRS study also looked at the type and quantity of minority interest programming by various owner groups. Was the programming regularly scheduled, or was it specially programming? Did the owner provide more than or less than 20 hours per week of minority interest programming? The statistical results conform to those described in the text. See CRS study, supra note xx, at 27 - 36.

The CRS study also examined separately stations reporting that their owners participated in management. The CRS found that stations "with black, Hispanic and Asian/Pacific manager-owners had a higher percentage programming for their own minority audience group and lower percentages for other minority groups." CRS study, supra note xx, at 40. This is consistent with both the taste and monitoring

cost advantage hypotheses. An owner who managed his station might satisfy his tastes more frequently at lower cost. Similarly, an owner-manager would be in the best position to utilize his monitoring cost advantage, for he would have personal knowledge of the day-to-day operations.

134. The CRS study used data on stations with less than 51% minority ownership interests and found large, unexplained differences between national patterns and those found in small markets. This reinforces my decision only to use data from stations where minorities hold ownership interests of greater than 50%.

135. CRS study, supra note xx, at 25.

136. Regarding Urban Contemporary, see Michael C. Keith, Radio Programming: Consultancy and Formatics, 147 (1987).

Some sample radio demographics:

KGFJ (930-9090)
L.A. radio station classified as "black" by Arbitron.

Listener's demographics (as supplied by station)
Age: 25 - 54
Male/Female ratio - 50/50
Race percentiles -
Black - 70%
Hispanic - 20%
Other - 10%
Station is both, owned and managed by minorities

KKGO (478-5540)
L.A. radio station, formerly Jazz, now Jazz and Classical.
Listener's demographics (as supplied by station, for Jazz format)
Age: 25 - 54
Male/Female: 50/50
Income: $75,000 (professional types)
Race -
White - 75%
Black - 20%
Other - 5%
Station representative said that they expect the demographics that represent the new format to be similar though they do expect to lose some of the Black and Hispanic audience.

Station is managed by minorities, Black, Hispanic, Filipino.

WBGO (201-624-8880)
Newark, N.J. public Jazz station
Listener's Demographics
Age: 30-55
Male/Female: 65/35

Income: $35,000+
Race -
White - 50%
Black - 25%
Latino - 25%
No significant minority ownership nor mangement.

KKSF
San Francisco Jazz, New-Age station
Listener's Demographics
Age: 25-54
Male/Female: 50/50
Income: $50,000+
Race -
White - 80%
Black - 10%
Hispanic - 4%
Other - 6%
No significant minority ownership nor management.

KBLX (415-848-7713)
San Francisco R&B, Jazz, Adult-Contemporary station.
Listener's Demographics
Age: 25-54
Male/Female: 55M/45F
Income: $100,000+
Race -
White - 50%
Black - 40%
Other - 10%
Station is minority owned but not operated.

KJAZ (415-769-4800)
Alameda (San Francisco) Jazz station.
Listener's Demographics
Age: 25-54
Male/Female: 66M/33F
Income: $32,000
Race -
White - 75%
Black - 16%
Hispanice - 4%
Other - 5%
Not owned or managed by minorities (formerly owned in partnership w/Lionel Wilson, mayor of Oakland (Black) but he was bought out 8 years ago.

Demographic information based on survey that station did. One thousand questionnaires sent out, 720 returned and usable.

KLON (985-5566)
Long Beach public Jazz station.
Listener's Demographics

Age: 30-60
Male/Female: 70M/30F
Income: $40,000
Race -
White - 1/3
Black - 1/3
Other - 1/3
Station owned by Cal State Long Beach. Upper management mostly white.

WBEZ
Chicago public radio station, jazz in the evening.
Listener's Demographics
Age: 25-44
Male/Female: 60/40
Income: $40,000 - $75,000
Race -
White - 91.9%
Black - 8.1%
License held by Chicago Board of Ed.; general superintendant of schools and president of Bd. of Ed. black. Significant minority management, news director, black woman, station manager, white woman.

WQCD
NY jazz contemporary station
Listener's Demographics
Age: 25-44
Male/Female: 60/40
Race -
White - 45%
Black - 45%
Hispanic - 10%
Owned by Tribune Corp. No significant minority management.

137. In addition, there is the possibility, explained in note 115, supra, that minority owners' choice of station location was determined by social factors, and that location determined broadcast content. Hence, the data would be worthless for appraising a policy that just targets minority owners' characteristics, rather than station location.

138. I must issue a word of caution about the application of these cases to broadcasting. All four of these cases deal with the allocation of jobs or job training. The minority preference policies, however, goven allocation of a productive asset (the right to use the electromagnetic spectrum). Affirmative action programs for jobs implicate issues of personhood and stigmatization that are fundamentally missing from the minority preference policies in broadcasting. This difference might change the outcome of some cases.

The correlation between affirmative action programs and human capital has been so high that the Supreme Court's cases evaluating race-based employment plans under Title VII have been discussed in law review articles evaluating the Constitutional law of affirmative action. See, e.g., Michel Rosenfeld, Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality, 87 Mich. L. Rev. 1729, 1735 n.27 (1989); and Kathleen M. Sullivan, Sins of Discrimination: Last Term's Affirmative Action Cases, 100 Harv. L. Rev. 78 (1986).

139. A thorough evaluation of racial preferences requires subtle and complex normative, political, historical, economic and psychological arguments. For a good discussion of many of these issues, see Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723 (1974); Thomas Sowell, Civil Rights: Rhetoric or Reality? (1984) Kathleen M. Sullivan, Since of Discrimination, supra note xx; Tribe, Perspectives on Bakke,: Equal Protection, Procedural Fairness, or Structural Justice?, 92 Harv. L. Rev. 864 (1979); Kennedy, Persuasion and Distrust: A Comment on the Affirmative Action Debate, 99 Harv. L. Rev. 1327 (1986); Days, Fullilove, 96 Yale L. J. 453 (1987) [and others]. For a public choice theoretic analysis of Bakke, see Spitzer.

I have no such grand ambitions for this article. Instead, I review the cases in text only to establish the directions in which Supreme Court jurisprudence has been evolving, with an eye focussed on the utility of data connecting minority ownership of broadcasting stations with minority programming in any upcoming Supreme Court test of the minority preference policies.

140. Regents of the University of California v. Bakke, 438 U.S. 265 (1978); Fullilove v. Klutznick, 448 U.S. 448 (1980); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986); and Richmond v. J.A. Croson, Co., 57 U.S.L.W. 4132 (1989).

141. 438 U.S. 265 (1978).

142. Regents of University of California v. Bakke, 438 U.S. 265, 300-05 (1978).

143. Id. at 306.

144. Id. at 310-11.

145. Id. at 317.

146. Chief Justice Burger, joined by Stewart, Rehnquist and Stevens, found that Title VI of the Civil Rights Act of 1964 made the U.C. Davis plan illegal, and did not reach the Constitutional issue.

147. Id. at 359 (quoting Califano v. Webster quoting Craig v. Boren.)

148. Id. at 362,

149. Id. at 366-67.

150. Id. at 370-71.

151. Id.

152. Id. at 376-77. The argument, now commonly accepted, that such programs stigmatize those minority applicants who would have qualified for admission without any such program, was turned away with some rather ham-fisted rhetoric:

> Once admitted, these [minority] students must satisfy the same degree requirements as regularly admitted students; they are taught by the same faculty in the same classes; and their performance is evaluated by the same standards by which regularly admitted students are judged. Under these circumstances, their performance and degrees must be regarded equally with the regularly admitted students with whom they compete for standing. Since minority graduates cannot justifiably be regarded as less well qualified than nonminority graduates by virtue of the special admissions program, there is no reasonable basis to conclude that minority graduates at schools using such programs would be stigmatized as inferior by the existence of such programs.

Id. at 377.

153. Id. at 377. Brennan also rejected Powell's approach of requiring that race be used in a multicriteria choice process. Such a process, said Brennan, would inevitably work just like the U.C. Davis program. Id. at 378-79.

154. 448 U.S. 448 (1979).

155. Pub.L. 95-28, 91 Stat. 116.

156. That section read:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

91 Stat. 116, 42 U.S.C. sec. 6705(f)(2) (19___ ed.)

157. 448 U.S. 448, 455.

158. Id. at 458.

159. Id. at 460.

160. Id. at 462-67.

161. U.S. Const., Art. I, sec. 8, cl. 1.

162. 448 U.S. 448, 474-75.

163. Id. at 478.

164. Id. at 479-80.

165. Id. at 492.

166. Burger also made following arguments: (1) when acting to remedy past discrimination, Congress need not act in a "color-blind" fashion; (2) the relatively light burden, shared by nonminority firms, of not getting a few contracts, does not render the MBE provision illegal; (3) the underinclusiveness of the MBE program -- its failure to include every firm owned by a disadvantaged person -- doe not render it illegal. Congress may, but need not, extend the MBE provision in this fashion.

167. Id. at 487.

168. Id.

169. Id. 497.

170. Id. 502-03.

171. Id. at 506 (emphasis added).

172. Powell also emphasized that the set-aside figure of 10% rested comfortably within the region between the percentage of minority contractors (4%) and the minority percentage of the population (17%) in the USA. Id. 513. Also, this remedy does not fall so forcefully upon innocent third parties as to render it invalid. Id. 514-15.

173. Id. 519.

174. Id. 527-28.

175. Justice Stevens also dissented and wrote at length about his desire to review Congressional procedures, including the lack of fact finding before passage. In addition he argued that the MBE provision cannot be justified as an attempt to provide reparations to the entire classes of people (black, Hispanic, etc.) named there, because the benefits would not be distributed evenly. Next, he claimed, the MBE provision is not a remedy for past discrimination against minority contractors, because the legislative history is insufficient on this point. Id. 539-41. Third, he dismissed any claims to a "piece of the action", by powerful Congressmen. Id. 541-42. Last, he rejected bringing more MBEs into the economy as a justification because the MBE provision was not narrowly tailored and was unlikely to work.

176. 476 U.S. 267 (1986).

177. The clause in question read:

> In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverese order for positdions for which he is certificated maintaining the above minority balance.
>
> 476 U.S. 267, 270-71.

178. Id. 272.

179. Id. 274.

180. Id. 275-76. This appears to be a complete misreading of the argument. Just because the role model argument might justify retaining some black teachers doesn't mean that it could justify firing or refusing to hire them. Justice Marshall, in dissent, picked up this point.

181. Id. 277.

182. Id. at 279. Justice O'Connor did not join in this portion of the opinion.

183. Id. at 283-84.

184. Id. at 288, n.*.

185. Id. at 301-02. Marshall had previously suggested that the case was not in a proper condition for decision, and that a remand was in order. Id. at 296.

186. Id. at 310-11.

187. Id. at 316.

188. Law, that is, in Oliver Wendell Holmes' formulation as a prediction of what courts will do. See Oliver W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 457 (1897).

189. 57 U.S.L.W. 4132 (Jan. 24, 1989).

190. An MBE was one owned or controlled at least 51% by minority group members. A minority was defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." 57 U.S.L.W. 4132, 4134.

191. Id. at 4135.

192. The rule provided:

> No partial or complete waiver of the foregoing requirement shall be granted by the city other than in exceptional circumstances. To justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises . . . are unavailable or unwilling to participate in the contract to enable meeting the 30% MBE goal.

57 U.S.L.W. at 4134-35.

193. O'Connor points out that "[t]he principal opinion in Fullilove, written by Chief Justice Burger, did not employ "strict scrutiny" or any other traditional standard of equal protection review." Id. at 4137.

194. The 14th Amendment reads, in part:

> Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

195. Id. at 4138.

196. "In this case, blacks comprise approximately 50% of the population of the city of Richmond. Five of the nine seats on the City Council are held by blacks." Id. at 4139.

197. Id. at 4140.

198. Id. at 4140.

199. There is, simultaneously, a trend of reducing the scope of federal civil rights laws. See Martin v. Wilks, 57 U.S.L.W. 4616 (1989)(allowing litigation of racially explicit consent decrees designed to remedy past discrimination, where litigants were not parties to original action); Patterson v. McLean Credit Union, 57 U.S.L.W. 4705 (1989)(refusing to apply 42 U.S.C. sec. 1981 to employer conduct after the formation of the employment contract); and Wards Cove Packing Company v. Atonio, 57 U.S.L.W. 4583 (1989)(requiring plaintiffs to shoulder heavier burdens when proving a "disparate-impact" case under Title VII).

200. Id. at 4143-45.

201. Id. at 4146-47.

202. Id. at 4148-49.

203. Id. at 4154.

204. Id. at 4156, n.12.

205. cite

206. If the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.
109 S. Ct. at 720.
See also Rosenfeld's discussion in Decoding Richmond, supra note xx, at 1751.

207. Except, maybe, Scalia. See Croson, at xx.

208. As Michel Rosenfeld describes in Decoding Richmond, supra note xx, at 1751, there are several models of permissible remedies in this area. The most restrictive requires actual injurors to help actual victims. Other models allow some slippage between the set of actual injurors and those who provide the help to victims, or some slippage between the set of actual victims and those who receive the help. If we allow a great deal of slippage within both the injuror and victim sets, we reinvent something like the remedy of general societal discrimin

209. Bakke at 310-11.

210. It seems fairly clear that neither the FCC nor Congress has relied, yet, on remedial justifications to support the minority preferences. See Judge Wald's dissent in Shurberg, supra note xx, at 168-69.

211. Although the FCC has never claimed that this is the reason for the minority preference policies, the general case is so easy to make in almost any industry, and the factual support so amorphous, that I will presume that a favorably disposed court would consider the justification at any time.

212. See page xx, supra.

213. Indeed, Judge Williams, dissenting in Winter Park, has suggested remanding the entire case to the FCC to allow it to consider and take evidence on this rationale. Winter Park, supra note xx, at 27.
Note that there are interesting issues as to whether Congress might need a less extensive factual record than would the FCC.

214. Testimony of John Payton Before the United States Senate Committee on Commerce, Science and Transportation, Communications Subcommittee, September 15, 1989; Statement of James L. Winston, Executive Director & General Counsel of The National Association of Black Owned Broadcasters before the Subcommitte on Communications of the United States Senate Committee on Commerce, Science and Transportation, September 15, 1989 (offering to help assemble a factual record); and Address of Mr. Percy E. Sutton before id., September 15, 1989.

215. 1989 U.S. App. Lexis 5377 (April 21, 1989); 873 F.2d 347 (D.C. Cir. 1989), cert granted _____.

216. Id. at 16.

217. 1989 U.S. App. Lexis 4582 (March 31, 1989); ____ F.2d ____ (1989).

218. Id. at 44.

219. There are hints in Croson that only proven victims of the past discrimination may receive the redial rights.

220. In the testimony at the Senate hearings, only one person even mentioned the possibility that the FCC had been guilty of discrimination, and he said that he knew of no evidence to support such an allegation. See Testimony of Allan Shurberg, supra note xx.

221. Schwartz, Comparative Television and the Chandellor's Foot, 47 Geo. L.J. 655, 690-94 (1959).

222. I have no clue as to the sources upon which they might rely. I made a first pass at the historical sources and found no direct evidence of racism on the part of Federal Communications Commissioners.

223. I have found no historical evidence upon this point.

224. Judge MacKinnon found the distress sale policy wanting because it was unconnected to the remedial goal. Shurberg, supra note xx, at yy.

225. West Michigan, supra note xx, at yy.

226. See TANS xx through yy, supra.

227. Wald dissent at Lexis pg. 136

228. See Williams opinion in Winter Park at Lexis pgs. 30-32. There are subsidiary arguments on this issue, such as whether the FCC findings that the market provides sufficient diversity to repeal the fairness doctrine should defeat any attempt to justify the minority preference policies as increasing diversity. See Wald in Shurberg at Lexis pg. xx and Silberman in

Shurberg at Lexis pg. yy.

229. See TAN xx.

230. Id. at 506 (emphasis added).

231. Powell also emphasized that the set-aside figure of 10% rested comfortably within the region between the percentage of minority contractors (4%) and the minority percentage of the population (17%) in the USA. Id. 513. Also, this remedy does not fall so forcefully upon innocent third parties as to render it invalid. Id. 514-15.

232. Wald at Lexis 142.

233. Wald at Lexis 142.

234. Wald at Lexis 143.

235. Wald at Lexis 143.

236. Wald at Lexis 144. See also statement of Sen. Ernest Hollings, Congression Record -- Senate, July 27, 1988, S10021.

237. Wald at Lexis 144-45.

238. Judge MacKinnon, in Winter Park, found the burden of proof so heavy from Congressional findings that he refused to visit the evidence, at all. In essence, the nexus was established as a matter of law, not as a matter of fact, for MacKinnon.

239. Williams at Lexis 42-44. See also id. at 45, where Williams explicitly cites Croson for the appropriate evidentiary standard.

240. See TAN xx.

241. This is, in essence, the FCC position that was rejected in TV9.

There is one fascinating, subsidiary issue. If the revised minority preference policies were to be adopted by rulemaking proceedings by the FCC (perhaps pursuant to rather specific directions from Congress to hold rulemaking proceedings), would the Court apply the same level of scrutiny to factual findings by the FCC as by the Congress? The hints in previous cases suggest that the answer is "no"--that the FCC findings will be subject to stricter scrutiny.

242. Even if that alternative were to fail, and some racially explicit classification were needed, the government might be required to try some less intrusive policy. In particular, the Minority Task Force report in 1978 indicated that the two biggest problems preventing minority purchase of broadcasting stations were the lack of information about stations for

sale, and the lack of adequate financing. The Congress might be required to try remedying these two problems, first.

243. 106 S.Ct. 1842, 1848, 1854 (1986); 476 U.S. 265, 276, 287 (1986).

244. 106 S.Ct. 1842, 1851-52 (1986); and 476 U.S. 265, 282-84 (1986).

245. 106 S.Ct. at 1861-62; 476 U.S. at 302.

246. Wald, at Lexis pg. 159.

247. Silberman at Lexis pg. 99 (approx).

248. Of course the cost of running such a hearing in each case might make this a very bad idea.